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**UBER UNSETTLED: HOW EXISTING TAXICAB
REGULATIONS FAIL TO ADDRESS TRANSPORTATION
NETWORK COMPANIES AND WHY LOCAL REGULATORS
SHOULD EMBRACE UBER, LYFT, AND COMPARABLE
INNOVATORS**

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I. INTRODUCTION

Existing legal commentaries and analyses discuss the development of “sharing economies” and the businesses that profit from the concept.¹ Together, writers tend to agree that these innovators should not be left entirely unchecked by regulatory bodies, but that premature or poorly planned and executed regulation will backfire to stifle valuable entrepreneurialism.² However, these writers tend to shy away from taking a firm stance on how regulatory bodies should proceed.³ This is understandable given the confusion about how these businesses actually interact with the traditional models they resemble and sometimes compete directly against.⁴ It is further forgivable that legal scholars

¹ See, e.g., Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Government Policy: The Future of Local Regulation of the “Sharing Economy,”* GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES No. 15-01 (Jan. 14, 2015), http://www.law.gmu.edu/assets/files/publications/working_papers/1501.pdf (predicting that local and state governments will adopt one of three approaches to sharing economy firms while continuing to protect incumbents and consumers). See also Christopher Koopman, Matthew D. Mitchell & Adam D. Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529 (2015) (discussing the ability of sharing economies to overcome market failures and reduce the need for regulation). See also Sofia Ranchordàs, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413 (2015) (arguing for minimal regulatory intervention of innovative sharing economy business models).

² See Rauch & Schleicher, *supra* note 1, at 1 (recognizing that many of the regulations sought have stifled sharing economies or even barred some potential participants from entry); Koopman, Mitchell & Thierer, *supra* note 1, at 530 (arguing that continuing to apply “outmoded regulatory regimes” will be more likely to harm, rather than benefit, consumers); Ranchordàs, *supra* note 1, at 414 (arguing for broad rules that do not stifle innovation).

³ See Rauch & Schleicher, *supra* note 1, at 1 (proposing three different policy options for those seeking to regulate); Koopman, Mitchell & Thierer, *supra* note 1, at 530 (proposing necessary further research and a “more informed regulatory approach” that responds to the ever changing innovations of sharing economies); Ranchordàs, *supra* note 1, 414 (arguing for rules and regulations that are left open for future developments). *But see* Darcy Allen, *What is a Taxi? Regulation and the Sharing Economy*, OECD INSIGHTS: DEBATE THE ISSUES (Dec. 22, 2014), <http://oecdinsights.org/2014/12/22/what-is-a-taxi-regulation-and-the-sharing-economy/> (arguing for regulatory abstention from the still developing market of sharing economy firms).

⁴ See e.g., Maria Zafar, *Transportation Network Companies: Key Regulations & Next Steps*, CAL. PUB. UTIL. COMM’N (Nov. 4, 2014) (comparing regulation of Transportation Network Companies and Transportation Charter Parties), <http://www.cpuc.ca.gov/NR/rdonlyres/25CCBFB7-24F6-4706-A932-A4C6A61EE656/0/TNCEnBanc.pdf>. See also, Susan Shaheen, *Transportation Network Companies and Ridesourcing: Comparing Taxi and TNC/Ridesourcing* . . .
continued . . .

stop short of making recommendations given the near certainty that none of these innovators are likely to remain or become static.⁵ Some suggest that new rules should be made to fade, so that lawmakers can later choose to adopt, adapt, or drop them altogether, depending on what these innovators do.⁶ This wait-and-see method piles uncertainty upon uncertainty, and does little to address the concerns of those most directly affected by the current lack of guidance.

This comment will take a more direct approach: offering and advocating for some specific answers to the vexing question of how to handle these new market entrants. This comment will focus on the innovators that have been described as “Transportation Network Companies” or “TNCs”,⁷ and in particular, the current market leader, Uber Technologies, Inc. (“Uber”).⁸ The policies advocated for herein are generally applicable to other TNCs. The approach may provide some insight for other sharing economy innovators, but will not explore those businesses in detail here, leaving an open invitation for other writers. Ultimately, this comment will discuss: (a) what it means to be a TNC, and how that differs significantly from taxicab operations; (b) why local regulatory bodies are failing to regulate TNCs effectively; (c) the purported market failures of taxicabs, and how they do or do not apply to TNCs; (d) some early attempts and refusals to regulate; (e) why local lawmakers should be embracing TNCs; and (f) what can and should be done to actively embrace the new models. Specifically, this comment will assert that communities that protect incumbent taxicab coalitions by resisting TNCs do so for political rather than economically

Trips and User Characteristics in San Francisco, U.C. BERKELEY TRANSP. SUSTAINABILITY RESEARCH CTR. (Nov. 4, 2014), http://www.cpuc.ca.gov/NR/rdonlyres/5C961222-B9C8-4E53-A54D-FC2A89C0A30C/0/RidesourcingCPUCShaheen_Final_v2.pdf (comparing data collected from San Francisco on Taxis and TNC/Ridesourcing entities).

⁵ Kellie Mejdrieh, *Airports Looking to Crack Down on Ride-Hailing Apps Like Uber, Lyft for Airport Pickups*, ORANGE CNTY. REGISTER (Jan. 10, 2015, 10:37 AM), <http://www.ocregister.com/articles/airport-647771-companies-state.html> (quoting UC Berkeley adjunct professor Susan Shaheen as saying that “[t]his level of change and disruption that we’ve observed since 2010 is not letting up. There are more services coming online every day.”).

⁶ Ranchordàs, *supra* note 1, at 451 (“Regulators can increase flexibility of regulations to accompany the pace of innovation both by including a sunset clause—which predetermines their expiry at the end of a certain period—or by experimenting with new rules.”).

⁷ Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, & New Online-Enabled Transp. Servs., D. 14-04-022, 2014 WL 1478349, at *1 (Cal. P.U.C. Apr. 10, 2014).

⁸ Tracy Lien, *Lyft Says It’s Growing 500% a Year in Ride Count and Revenue*, L.A. TIMES (Jan. 27, 2015, 6:00 AM), <http://www.latimes.com/business/la-fi-lyft-branding-20150127-story.html>.

justifiable reasons. Local regulators should instead send signals to these and other innovators that change is welcome by taking early action to embrace TNCs, while taking some small steps to intervene for public safety. Concurrently, regulators should review existing taxicab regulations and relax or remove those rules that do not actually correct market failures.

II. BACKGROUND

A. What It Means to be a TNC; How That Differs from Taxicab Operations

A TNC is an organization that uses a digital platform to connect riders with drivers.⁹ A rider is a person without vehicular transportation, whether temporarily (e.g., visiting a city or a night out in the hometown) or permanently (e.g., an urbanite who either cannot or chooses to not invest in owning a car)¹⁰, and who wants to pay to be transported privately in a vehicle.¹¹ A TNC driver is a person with a suitable car and free time, who wishes to offer both of these resources in the form of transportation services to riders,¹² whether as a part-time or temporary endeavor, or as a full-time occupation.¹³

TNCs provide a mobile software application (an “app”) that allows drivers to make themselves available (or not) to potential riders.¹⁴ Riders access the network of available drivers through the app, and then select a car and driver that meets their preferences.¹⁵ Riders can discern among TNC drivers by type of vehicle, proximity, and published individual driver ratings that reveal assessments made by previous riders.¹⁶ The TNC provides the digital platform for connecting the rider and the driver, and streamlines the process by processing payment directly through the app,¹⁷ using credit card information already

⁹ CAL. PUB. UTIL. CODE § 5431 (West 2015).

¹⁰ See Mark Rogowsky, *Zipcar, Uber and the Beginning of Trouble for the Auto Industry*, FORBES (Feb. 8, 2014, 7:57 AM), <http://www.forbes.com/sites/markrogowsky/2014/02/08/viral-marketing-car-sharing-apps-are-beginning-to-infect-auto-sales/>.

¹¹ *Id.*

¹² See CAL. PUB. UTIL. CODE § 5432 (West 2015).

¹³ See *Uber Needs Partners Like You*, UBER, <https://get.uber.com/drive/> (last visited Sept. 21, 2015).

¹⁴ *Drive With Uber—Earn Cash With Your Car! (Full-Time)*, UBER BLOG (Mar. 28, 2014), <http://blog.uber.com/partners>.

¹⁵ *How do I request a ride?*, UBER, <https://help.uber.com/h/7ef159ca-3674-4242-bc0c-b29024958b26> (last visited Sept. 21, 2015).

¹⁶ Rauch & Schleicher, *supra* note 1, at 9.

¹⁷ Complaint at 1, *California v. Uber Techs., Inc.*, No. CGC-14-543120, 2014

provided by the rider. Fees are based on location, category of vehicle selected, per minute and per mile rates added to a base fare and fees,¹⁸ and can vary depending on the supply of drivers relative to demand from riders.¹⁹ Uber uses the last variable in this model to incentivize inactive drivers to become available to riders by escalating prices using a demand multiplier, resulting in what is known as “surge pricing.”²⁰

In contrast to TNCs, a taxicab operator is the driver of a vehicle that is used exclusively for transportation-for-hire services.²¹ Taxicab vehicles and their operators (“taxicabs”) are subject to various regulations by states and municipalities.²² Local regulations apply with various levels of intensity to many taxicabs.²³ These regulations typically include pricing, insurance, background checks, vehicle age and inspections, modifications to the vehicles such as colors, identifiers, meters, and more.²⁴ Taxicabs must also comply with anti-discrimination policies, though this can prove difficult to enforce.²⁵ In exchange, taxicabs benefit from the exclusive ability to respond to “street hails,”²⁶ where potential riders can request taxicab services

WL 6911066 (Cal. Super. filed Dec. 9, 2014).

¹⁸ See, e.g., *Charlotte*, UBER, <https://www.uber.com/cities/charlotte> (last visited Sept. 21, 2015).

¹⁹ See *What Is Surge Pricing?*, UBER, <https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdc119> (last visited Sept. 20, 2015); see also *Clear and Straight-Forward Surge Pricing*, UBER BLOG (Mar. 14, 2012), <http://blog.uber.com/2012/03/14/clear-and-straight-forward-surge-pricing/>; Travis Kalanick, *Surge Pricing Followup*, UBER BLOG (Jan. 3, 2012), <http://blog.uber.com/2012/01/03/surge-pricing-followup/>.

²⁰ See *Clear and Straight-Forward Surge Pricing*, *supra* note 19.

²¹ See, e.g., S.F., CAL., TRANSP. CODE, art. 1100, div. 2, § 1102 (2015).

²² REX DEIGHTON-SMITH, TAXI SERVICES: COMPETITION AND REGULATION 199–200 (2007), available at <http://www.oecd.org/regreform/sectors/41472612.pdf>. See also Adrian T. Moore & Ted Balaker, *Do Economists Reach a Conclusion on Taxi Deregulation?*, 3 ECON JOURNAL WATCH 109, 109 (Jan. 2006), <http://econjwatch.org/articles/do-economists-reach-a-conclusion-on-taxi-deregulation> (“Most cities control entry into the market and set prices, as well as set requirements for drivers, vehicles, finances, and operations.”).

²³ See DEIGHTON-SMITH, *supra* note 22, at 199.

²⁴ *Id.* at 200.

²⁵ Danita L. Davis, *Taxi! Why Hailing a New Idea About Public Accommodation Laws May Be Easier Than Hailing a Taxi*, 37 VAL. U. L. REV. 929, 969–70 (2003) (comparing the Chicago and New York City approaches and discussing competing concerns of racism, economics, and safety).

²⁶ See *2014 Taxicab Fact Book*, NYC TAXI & LIMOUSINE COMM’N (2014), http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf (depicting graphically the various regulations applicable to transportation-for-hire services in New York City); see also, MARK W. FRANKENA & PAUL A. PAUTLER, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION 26, available at <http://www.ftc.gov/reports/economic-analysis-taxicab-regulation>.

curbside without any prearrangement, digital or otherwise.²⁷ Prearranged services result in a taxicab being dispatched by radio or other communication from a central location.²⁸ In some cases, taxicabs that transport a passenger into another jurisdiction must remain empty for the return trip.²⁹

Local regulations may also limit the number of taxicabs that can be registered in a city or county at a given time.³⁰ This ostensibly serves to limit vehicle congestion,³¹ but more accurately and importantly, places a premium on the ownership of the transferrable right to register and lease a vehicle as a taxicab.³² Taxicab operators are typically not the owners of the rights, a bundle that is sometimes called a “medallion.”³³ When cities limit the supply of medallions, the market price for a license can skyrocket.³⁴ In New York, taxicab medallions have been valued at over one million dollars.³⁵ On a smaller scale than city medallions, and subject to some controversy,³⁶ airport authorities sometimes negotiate contracts with a limited number of taxicab companies in order to reduce congestion and streamline consistent service.³⁷

Individual taxicab operators are feeling the financial pinch because, in most places, they are prohibited from playing by the same rules (or lack thereof) as the TNCs.³⁸ Medallion owners have perhaps the

²⁷ FRANKENA & PAUTLER, *supra* note 26, at 26.

²⁸ *See, e.g.*, 53 PA. CONS. STAT. ANN. § 5721 (West 2015).

²⁹ FRANKENA & PAUTLER, *supra* note 26, at 91.

³⁰ DEIGHTON-SMITH, *supra* note 22 at 7–8.

³¹ *Id.* at 23.

³² *Id.* at 7.

³³ Rohin Dhar, *The Tyranny of the Taxi Medallions*, PRICEONOMICS (Apr. 10, 2013), <http://blog.priceonomics.com/post/47636506327/the-tyranny-of-the-taxi-medallions>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ely Portillo & Steve Harrison, *FBI Looking into Charlotte Airport Taxi Contract*, CHARLOTTE OBSERVER (May 22, 2014), http://www.charlotteobserver.com/2014/05/22/4927140/fbi-looks-at-taxi-contract.html#.VNUUm_mjOSo.

³⁷ Tom Bullock, *Airport Extends...And Cancels Controversial Taxi Contract*, WFAE 90.7 (May 28, 2014), <http://wfae.org/post/airport-extendsand-cancels-controversial-taxi-contract>; *see also* Kellie Mejdrieh, *Airports Looking to Crack Down on Ride-Hailing Apps Like Uber, Lyft for Airport Pickups*, ORANGE CNTY. REGISTER (Jan. 10, 2015) <http://www.ocregister.com/articles/airport-647771-companies-state.html> (discussing California Yellow Cab’s contract with John Wayne Airport (SNA) of Orange County, California).

³⁸ *Compare* Bos. Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2015 WL 314131, at *3–4 (D. Mass. Jan. 26, 2015) (refusing to dismiss claims of

greatest financial stake in protecting these regulations and applying them to TNCs and TNC drivers.³⁹ The value of their rights to operate taxicabs has peaked in recent years,⁴⁰ and is likely to diminish in an open market⁴¹ as operators are unable to generate fares sufficient to pay expensive leases, or are unwilling to do so because they can simply become TNC drivers.⁴²

Taxicab regulations were developed in part as an effort to correct deficiencies in the market,⁴³ but the long list of rules are often weighted in favor of taxicab suppliers, rather than rider-consumers.⁴⁴ Consumer response to TNCs has shown that the original or alleged goals of taxicab regulations are no longer being achieved to their satisfaction.⁴⁵ Taxicab regulations are not uniformly applied because the decisions regarding whether and how to regulate are made locally, either at a state or municipal level.⁴⁶ The most important market failures that have historically been addressed by regulations generally include insurance, driver background checks, barriers to entry including limited licenses or medallions, vehicle standards including trade dress and safety inspections, exclusive ability to accept street hails, price controls, and discrimination prohibitions.⁴⁷ Each of these will be explored later in this comment and in the context of applicability to TNCs.

unfair competition), *and* *Manzo v. Uber Techs., Inc.*, No. 13 C 2407, 2014 WL 3495401, at *4 (N.D. Ill. July 14, 2014) (refusing to allow a private cause of action for alleged violation of municipal codes), *with* Complaint, *supra* note 17, at 24 (claiming that Uber’s corporate policy of “Regulatory Disruption” is a willful violation of California law).

³⁹ DEIGHTON-SMITH, *supra* note 22, at 7–8 (asserting that high and rising license “values represent continuing and increasing transfers from consumers to taxi [license] owners as a result of the policy of supply restriction.”).

⁴⁰ *Id.* at 32–33.

⁴¹ See Letter from FTC to The Honorable Debbie Ossiander, Assembly Member, Seat A, Municipality of Anchorage, at 4 (Apr. 9, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-anchorage-assembly-member-debbie-ossiander-concerning-ao-no.2013-36-proposing-changes-regulatory-framework-licensing-and-permitting-taxicabs-limousines-and/130426anchoragecomment.pdf.

⁴² See *Bos. Cab Dispatch, Inc.*, 2015 WL 314131, at *4 (explaining that “common economic sense suggests that Uber’s expansion of its car service business would have a high likelihood of affecting the revenue of all Boston medallioned taxis, including the plaintiffs.”).

⁴³ FRANKENA & PAUTLER, *supra* note 26, at 2–5.

⁴⁴ DEIGHTON-SMITH, *supra* note 22, at 7–10.

⁴⁵ See, e.g., Serena Saitto, *Uber Valued at \$40 Billion in \$1.2 Billion Equity Funding*, BLOOMBERG BUS. (Dec. 4, 2014), <http://www.bloomberg.com/news/articles/2014-12-04/uber-valued-at-40-billion-with-1-2-billion-equity-fundraising>.

⁴⁶ DEIGHTON-SMITH, *supra* note 22, at 199.

⁴⁷ *Id.* at 200.

Arguments for the sometimes onerous regulations that apply to taxicab operations are weaker when applied to vehicles that are not wholly dedicated to providing transportation services.⁴⁸ When taxicab vehicles are not taking fares, they are not being personally used by drivers—they sit idle, waiting for the next shift.⁴⁹ By contrast, TNC vehicles maximize utility by shifting unproductive down time to meet consumer demands for private on-demand transportation, which differ significantly in form and function from taxicabs.⁵⁰

Asymmetrical information is inherent in both industries, which justifies some regulations that truly protect consumers, namely insurance and driver background checks. Taxicab regulations hinder competition and are in need of reform,⁵¹ but should not be haphazardly transposed onto TNCs out of sheer political expediency. Between the two extremes, there is a middle ground that can be exposed by exploring the laundry list of rules that are present for taxicabs and still forming for TNCs. First, though, it is necessary to address some of the reasons that lawmakers are failing to regulate TNCs.

⁴⁸ See Letter from FTC to Jacques P. Lerner, Gen. Counsel, D.C. Taxicab Comm'n, at 3 (June 7, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf (discussing the “more efficient allocation of resources (e.g., vehicles and drivers) to consumers” and asserting that any new “regulatory framework should enable these various kinds of competition and not directly or indirectly restrict the introduction or use of new types of applications, or the novel features they may provide, absent some significant evidence of public harm.”). See also N.C. LAW REVENUES STUDY COMM., REP. TO THE GEN. ASSEMB., 2015 Sess., at 16 (2015), <http://www.ncleg.net/documents/sites/committees/revenuelaws/meeting%20documents/2013-2014%20meeting%20documents/report%20to%20the%202015-16%20general%20assembly.pdf> (discussing driver flexibility, saying that the “TNC model introduces the concept of switching between commercial operation and private operation when drivers decide they want to work.”).

⁴⁹ See Deven R. Desai, *The New Steam: On Digitization, Decentralization, and Disruption*, 65 HASTINGS L.J. 1469, 1477 (2014).

⁵⁰ See *Bos. Taxi Owners Ass'n, Inc. v. City of Boston*, No. 15-10100-NMG, 2015 WL 505397, at *7 (D. Mass. 2015) (holding that “TNCs operate in a fundamentally different manner from traditional taxicabs” and “there are significant distinctions between their business models, of which the Court only scratches the surface, that permit state or local authorities to treat them differently.”).

⁵¹ DEIGHTON-SMITH, *supra* note 22, at 205.

B. Why Local Lawmakers Fail to Effectively Regulate TNCs

1. *The strength of the taxicab incumbency is great*

Taxicab operators are upset because of what they view as unfair treatment when regulators either (a) ignore TNC presence by failing to apply all or even some of the taxicab rules to TNCs,⁵² or (b) embrace TNCs on any level by creating new rules that are less stringent than those applied to taxicabs.⁵³ Taxicab operators want to protect the income that is their livelihood.⁵⁴ Medallion owners want to protect their investments, but have been unable to show either actual damages or direct causation by Uber for losses in value accrued to the medallions.⁵⁵

The incumbent advantage is strong in its opposition to TNCs.⁵⁶ According to the Federal Trade Commission (“FTC”), “taxi ordinances and the government agencies that issue taxi regulations may not be motivated primarily by concern for market failure and achievement of an efficient resource allocation. It appears that taxi regulations have often been designed to protect public transit systems and existing taxi firms from competition.”⁵⁷

While the purpose of taxicab regulations has long been billed as protective of consumers, a *Boston Globe* exposé highlighted the reality

⁵² *Bos. Taxi Owners Ass’n*, 2015 WL 505397 at *3 (“[The Plaintiffs] assert that the amendments permit TNCs to operate as ‘de facto taxis’ and ‘create an irrational, two-tiered regulatory system’ that unconstitutionally violate the due process and equal protection clauses” and “seek an affirmative injunction that would mandate that the City of Boston enforce its existing taxicab regulations.”).

⁵³ See, e.g., *SFCDA’s Statement of Response to CPUC decision R.12-12-011*, S.F. TAXI DRIVERS ASS’N (Sept. 19, 2013), <http://www.sfcda.org/archives/770> (“The San Francisco Cab Drivers Association finds it disturbing that the CPUC is seeking to create a new class of for-hire transportation service which would not have the oversight of local regulatory bodies while unfairly competing with existing locally regulated taxi services.”).

⁵⁴ Complaint at 71, *Checker Cab Phila., Inc. v. Uber Technologies, Inc.*, No. 2:14CV07265, 2014 WL 7277272 (E.D. Pa. Dec. 23, 2014) (“[E]ach of the Plaintiffs has suffered substantial injury to its business or property . . . including, but not limited to lost or reduced fare revenues and substantial and irreparable loss of goodwill and business opportunity with consumers and customers.”).

⁵⁵ *Yellow Grp. LLC v. Uber Techs. Inc.*, No. 12 C 7967, 2014 WL 3396055, at *6 (N.D. Ill. July 10, 2014).

⁵⁶ See Rauch & Schleicher, *supra* note 1, at 24.

⁵⁷ FRANKENA & PAUTLER, *supra* note 26, at 6–7; see also Letter from FTC to the Colo. Pub. Utils. Comm’n, at 2 (Mar. 6, 2013), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-colorado-public-utilities-commission-concerning-proposed-rulemaking-passenger/130703coloradopublicutilities.pdf (“The report’s conclusions are still generally applicable today.”).

that “the system instead has evolved mainly to enrich the holders of government-issued taxi medallions.”⁵⁸ Bribery aimed at influencing D.C. taxicab legislation was revealed by an FBI probe that led to charges against three dozen involved in the scheme⁵⁹ and sent a council member’s chief of staff to prison.⁶⁰

Taxicab supporters make significant political contributions that undoubtedly influence decision-makers.⁶¹ Lobbyists advocating for taxis have spent \$6.1 million in California in less than two years, compared to \$593,133 by the combined TNCs over the same period.⁶² According to the Sunlight Foundation’s Open States project, “the taxi cab industry has donated at least \$3,500 to the political war-chests of state legislators for every \$1 that Uber, Lyft, and Sidecar gave.”⁶³

Some lawmakers may not intend to favor taxicabs, but simply do not fully understand⁶⁴ the services offered by TNCs and how they differ substantially from those of taxicab operators. Where judges do understand (and Uber is happy to explain), it is acknowledged that the

⁵⁸ Edward L. Glaeser, *Excessive Regulation Turns Boston Taxi Industry Into Corrupt Mess*, THE BOSTON GLOBE, Apr. 4, 2013, <http://www.bostonglobe.com/opinion/2013/04/04/excessive-regulation-turns-boston-taxi-industry-into-shadowy-corrupt-sphere/cQbYTEaNsBOtH1abtRde7J/story.html>.

⁵⁹ Del Quentin Wilber, *D.C. Taxi Industry Insiders Sentenced in Bribery Scheme*, WASH. POST (Feb. 20, 2012), http://www.washingtonpost.com/local/crime/dc-taxi-industry-insiders-sentenced-in-bribery-scheme/2012/02/10/gIQApuH04Q_story.html.

⁶⁰ Victor Zapana, *Former D.C. Council Aide Sentenced to 8 Months in Prison*, WASH POST (June 28, 2011), http://www.washingtonpost.com/local/former-dc-council-aide-sentenced-to-eight-months-in-prison/2011/06/28/AG8Y0mpH_story.html.

⁶¹ Rauch & Schleicher, *supra* note 1, at 24.

⁶² Joe Garofoli, *Ride Services Up Against Big Lobbying Push in Sacramento*, SF GATE (Aug. 6, 2014, 2:32 PM), <http://www.sfgate.com/default/article/Ride-services-up-against-big-lobbying-push-in-5633143.php#page-1>.

⁶³ Stan Oklobdzija, *Will Big Taxi’s Massive Political Spending Advantage Leave Ride-Sharing Groups Stranded?*, SUNLIGHT FOUND, (July 31, 2014, 1:54 PM), <http://sunlightfoundation.com/blog/2014/07/31/will-big-taxis-massive-political-spending-advantage-leave-ride-sharing-groups-stranded/>.

⁶⁴ Mark Pazniokas, *Uber, Taxis Line Up Lobbyists for Connecticut Battle*, THE CT MIRROR, Jan. 26, 2015, <http://ctmirror.org/2015/01/26/uber-taxis-line-up-lobbyists-for-connecticut-battle/> (quoting Rep. Antonio Guerrero, D-Rocky Hill, Connecticut as saying “[a]ll of a sudden, I start looking into it, they’re not as bad as I thought they were. I didn’t get the concept, basically. I am a pretty pro-business individual.”). See also Petition of the Bureau of Investigation and Enforcement of the Pa. Pub. Util. Comm’n, 2014 WL 3763990, at *7 (Pa. P.U.C. 2014) (“The ALJs rejected Uber’s contention that it is not a broker, but a software company licensing a smartphone application [and instead] . . . determined that the facts support I&E’s argument that Uber offered the transportation.”).

existing taxicabs are not an obvious fit for these new business models.⁶⁵ North Carolina, for example, disallowed municipalities from enacting new rules directed at TNCs, while it waited to decide on a state approach.⁶⁶ With no proposals for legislation throughout 2014,⁶⁷ there was little information available to guide expectations for the future of TNC policy in North Carolina, and nothing to assist local governments in addressing the regulatory gap. The NC Law Revenues Commission in January 2015 offered a brief synopsis of what TNCs are doing and where taxation potential exists, but declined to comment on regulatory policy.⁶⁸ Since North Carolina precluded local actions that would hinder TNC operations, taxicabs were forced to wait until nearly the end of this year for the legislature to catch up to the market, while TNCs continued to expand.⁶⁹

⁶⁵ See *Bos. Taxi Owners Ass'n, Inc. v. City of Boston*, No. 15-10100-NMG, 2015 WL 505397 at *7 (D. Mass. 2015) (noting that “TNCs operate in a fundamentally different manner from traditional taxicabs” and that “there are significant distinctions between their business models, of which the Court only scratches the surface, that permit state or local authorities to treat them differently”).

⁶⁶ Colin Campbell, *NC Legislature Looks to Regulate Uber, Airbnb*, CHARLOTTE OBSERVER, Nov. 18, 2014, <http://www.charlotteobserver.com/news/local/article9233918.html>.

⁶⁷ Jonathan Drew, *North Carolina Lawmakers Hear Pros, Cons of Uber, Lyft, Airbnb*, INS. J., Nov. 20, 2014, <http://www.insurancejournal.com/news/southeast/2014/11/20/347635.htm>.

⁶⁸ N.C. LAW REVENUES STUDY COMM., *supra* note 48, at 17 (“The Committee actively questioned the presenters and heard policy arguments” but “did not recommend specific action on this issue. Both Co-Chairs commented that the regulatory issues presented by TNC services are not related to the mission of the Revenue Laws Study Committee.”).

⁶⁹ Neesh Moorthy, *Local Cabs Struggle with Rise of Uber*, THE CHRON. (Duke Univ.), Feb. 23, 2015, http://www.dukechronicle.com/articles/2015/02/23/local-cabs-struggle-rise-uber#.VPaQQ_nF9qU (“As Uber has become increasingly popular in Durham, some local cab companies have struggled to keep up . . . [and] one of the reasons cities currently don’t regulate the service is because North Carolina law prohibits it.”). A North Carolina bill was signed into law on September 4, 2015, which is substantially in accord with the recommendations outlined later in this comment. 2015 N.C. Sess. Laws 237.

2. *Uber is earning a reputation for being a “jerk”*⁷⁰

For most lawmakers, just as for most consumers, Uber is the corporate face of all TNCs.⁷¹ Uber’s rapid expansion plans seem to allow little time for negotiation with local regulators before beginning operations.⁷² The company’s “playbook” consists of first campaigning for local support among businesses and consumers, rather than pleading with lawmakers to gain acceptance.⁷³ In states where Uber is required to obtain permission to operate, it does so after the fact, if at all.⁷⁴ Uber takes the stance that its operations are not *per se* illegal simply because existing laws are inapplicable.⁷⁵ By establishing a welcoming environment in the community, Uber puts resistant politicians in the difficult position of having to choose between appearing to protect taxicabs and being pro-competition.⁷⁶

Some regulators have been reluctant to take Uber head on because of its growing popularity among consumers (both riders and would-be riders).⁷⁷ Early in Uber’s short history, Massachusetts abruptly reversed its position on taxicab protection, allowing Uber to operate in response to a massive Twitter rebellion by the affected public.⁷⁸ The City of Boston has since refused to apply taxicab rules to TNCs and received judicial support for its decision.⁷⁹

⁷⁰ See Jennifer Booton, *You Don’t Have to Be an Über-Jerk to Win in Silicon Valley*, MARKET WATCH (Nov. 21, 2014, 7:40 AM), <http://www.marketwatch.com/story/you-dont-have-to-be-an-uber-jerk-to-win-in-silicon-valley-2014-11-20>; see also Matthew Iglesias, *Uber Has an Asshole Problem*, VOX (Nov. 18, 2014, 2:57 PM), <http://www.vox.com/2014/11/18/7240295/uber-privacy>.

⁷¹ Rauch & Schleicher, *supra* note 1, at 25 (“Today, Uber is the most valuable and prominent sharing firm.”).

⁷² *Id.* at 24–25.

⁷³ *Id.*

⁷⁴ *Id.* at 26.

⁷⁵ Defendant’s Objections to Portions of the Magistrate Judge’s Feb. 28, 2014 Report and Recommendation Regarding Defendant’s Motion to Dismiss at 2, 6–7, *Bos. Cab Dispatch, Inc., v. Uber Techs., Inc.*, (No. 1:13-cv-10769-NMG), 2014 WL 2758335 (D. Mass. 2014) (“[T]here is nothing unfair or illegal about what Uber does.”).

⁷⁶ Rauch & Schleicher, *supra* note 1, at 23–26.

⁷⁷ See *id.* at 24–25 (“The end result is that before cities can act or incumbents can effectively counterpunch, sharing firms are simply “too big to ban.”).

⁷⁸ Molly Cohen, *Internet Advocacy ‘Uber’ Alles: What Uber-Fans Accomplished in Boston & What It Means for Urban Democracy & Local Government*, TAXI-LIBRARY.ORG (Apr. 13, 2013), http://www.taxi-library.org/uber_allles.pdf.

⁷⁹ *Bos. Taxi Owners Ass’n*, 2015 WL 505397, at *7–8.

Most recently, South Carolina issued a cease and desist order⁸⁰ that met with immediate gubernatorial condemnation.⁸¹ Nevada⁸² and Pennsylvania⁸³ have also taken hard stances on halting illegal operations. In each instance, it is not clear that regulators and legislators are motivated by consumer protection concerns; rather, it seems clear that Uber's aggressiveness is stepping on political toes.⁸⁴ Some refer to Uber's business tactics as "seeking forgiveness, not permission,"⁸⁵ but Uber seems to be reticent in seeking either.⁸⁶

⁸⁰ Application of Rasier, LLC for a Class C - Transp. Network Co. Certificate of Pub. Convenience & Necessity for Operation of Motor Vehicle Carrier, No. 2014-372-T, 2015 WL 243537, at *2 (S.C. P. Service Comm'n Jan. 15, 2015) (denying permission to operate before obtaining Certificate of Public Convenience and Necessity).

⁸¹ Jen Wilson, *S.C. Governor Enters the Fight Over Uber*, CHARLOTTE BUS. J. (Jan. 23, 2015, 6:00 AM), <http://www.bizjournals.com/charlotte/print-edition/2015/01/23/s-c-governor-enters-the-fight-over-uber.html>.

⁸² *Uber Techs., Inc. v. Second Judicial Dist. Court of State ex rel. Cnty. of Washoe*, No. 66875, 2014 WL 6680785, at *1 (Nev. Nov. 24, 2014) (denying writ relief to petitioner and allowing the Nevada Transportation Authority to enjoin unlicensed operations). See also William, *Nevada, We're Here For the Long-Term*, UBER BLOG (Nov. 26, 2014), <http://blog.uber.com/NV>.

⁸³ Petition of the Bureau of Investigation & Enforcement of the Pa. Pub. Util. Comm'n for an Interim Emergency Order Requiring Uber Techs., Inc. to Immediately Cease & Desist from Brokering Transp. Serv. for Comp. Between Points Within the Commonwealth of Pennsylvania, No. P-2014-2426846 (Pa. P.U.C. July 24, 2014), 2014 WL 3763990, at *15 (granting interim emergency order requiring the TNC to cease and desist operations in Pennsylvania). *But see* Application of Rasier-Pa. LLC, A Ltd. Liab. Co. of the State of Del., for the Right to Begin to Transp., by Motor Vehicle, Persons in the Experimental Serv. of Shared-Ride Network for Passenger Trips Between Points in Allegheny Cnty., No. A-2014-2416127, 2015 WL 457019, at *6 (Pa. P.U.C. Jan. 29, 2015) (upholding a short-term operating permit which allows "time to promulgate additional regulations [or laws] to accommodate the proposed service if it is appropriate to do so.").

⁸⁴ See Lark Gould, *Nevada Becomes First State to Shut Down Uber*, WASH. TIMES (Nov. 28, 2014), <http://www.washingtontimes.com/news/2014/nov/28/uber-travel-nevada-becomes-first-state-shut-down-u/> ("Nevada transportation lobbies have long held sway in Las Vegas and have been blamed unofficially for standing in the way of progress in a city that can easily create and strongly benefit from efficient public transportation alternatives.").

⁸⁵ Robert Anglen, *Uber's Practices Cloud its Future: Ride-Share Company Faces Backlash, but Law-Abiding Rivals Have Trouble Competing with Popular Service*, THE REPUBLIC (Arizona), <http://www.azcentral.com/story/money/business/consumer/call-12-for-action/2014/12/30/uber-practices-cloud-future/21007973/> (last visited Sept. 21, 2015) ("Uber's business philosophy of seeking forgiveness rather than permission—of initiating operations while skirting local laws and regulations—has resulted in a worldwide backlash over safety issues, background checks and liability.").

⁸⁶ Complaint, *supra* note 17, at 24 ("One reporter who recently interviewed

continued . . .

Even in California, Uber's home state, the mammoth TNC has flouted its tailor-made rules.⁸⁷ Uber dragged its feet in complying with San Francisco International Airport ("SFO") and other airport demands that require TNCs to obtain operation permits and develop tools to ensure that its drivers comply with rules.⁸⁸ Uber has been accused of fraudulently charging airport access fees to riders that were higher than it was ever required to pay, and charging those fees even when the money was never to reach airport purses.⁸⁹ The Greater Orlando Aviation Authority filed suit alleging that Uber has conspired with drivers to violate its Ground Transportation Rules and Regulations, encouraged trespassing, and escaped permit and daily access fees.⁹⁰

Uber's brash CEO, Travis Kalanick, and his leadership team have displayed some remarkable instances of hubris, inviting the media and legislators to question the company's values.⁹¹ Uber Executive, Emil Michael, made comments suggesting that the company should hire opposition researchers to find and reveal "dirt on its critics in the media."⁹² The company unwittingly invited privacy concerns at its own

Kalanick for a lengthy profile story remarked, 'All told, it's not just that Uber has adopted the business school maxim 'Don't ask for permission; ask for forgiveness'—it has instituted a policy of asking for neither.'"). *See also* Robert Anglen, *Uber Officials Claim Laws Don't Apply*, THE REPUBLIC (Arizona) (Dec. 30, 2014) ("Uber spokeswoman Eva Behrend said this month that laws haven't kept up with technology," and "Behrend and other Uber officials don't address specific allegations. Instead, they talk about popularity and user demand to justify business practices.").

⁸⁷ Complaint, *supra* note 17, at 24 ("Uber's unabashed refusal to comply with California regulators and California law is consistent with its 'Regulatory Disruption' policy, is willful and persistent within the meaning of Business and Professions Code section 17206, and has been ongoing for years.").

⁸⁸ *Id.*

⁸⁹ Class Action Complaint at 9–10, *Tadepalli v. Uber Techs., Inc.*, No. CGC-14-543032, 2014 WL 6999610 (Cal. Super. filed Dec. 3, 2014).

⁹⁰ Verified Complaint at 2, *Greater Orlando Aviation Auth. v. Uber Techs., Inc.*, No. 2014-CA-011896-O, 2014 WL 6389608 (Fla. Cir. Ct. filed Nov. 14, 2014).

⁹¹ *See generally* Imogen Rose-Smith, *Uber's Bad-Boy Attitude Leaves It Prone to Ethical Lapses*, INSTITUTIONAL INVESTOR (Dec. 11, 2014), <http://www.institutionalinvestor.com/article/3409521/banking-and-capital-markets-corporations/ubers-bad-boy-attitude-leaves-it-prone-to-ethical-lapses.html#.VPIYVPmjOm4> (describing Uber CEO Kalanick as "dismissive" of riders and drivers, and listing other company transgressions).

⁹² Ben Smith, *Uber Executive Suggests Digging Up Dirt on Journalists*, BUZZFEED NEWS (Nov. 17, 2014, 7:57 PM), <http://www.buzzfeed.com/bensmith/uber-executive-suggests-digging-up-dirt-on-journalists#.nuDbk1jPY>. *But cf.* Dylan Byers, *The Stoning of Uber's Emil Michael*, POLITICO (Nov. 19, 2014, 2:18 PM),

continued . . .

Chicago launch party, where attendees say it presented its “God View” of vehicle activity and revealed some New York rider locations and identities.⁹³ In its own blog post titled “Rides of Glory” (since removed, but archived), Uber “examined its rider data, sorting it for anyone who took an Uber [late at night] Then it looked at how many of those same people took another ride about four to six hours later—from at or near the previous nights’ drop-off point” and rated neighborhoods based on the percentage of rides taken that appeared to be one-night stands.⁹⁴ Some embarrassing internal emails about drivers that had to be removed from the company network displayed “the kind of callousness that critics contend characterizes Uber” and were made public as part of a class action suit over the designation of drivers as independent contractors.⁹⁵

Unfortunate incidents involving Uber and other TNC drivers call into question the effectiveness of background checks and the veracity of Uber’s claim of offering the “safest rides on the road; going the distance to put people first.”⁹⁶ A six-year-old San Francisco girl was killed when an Uber driver struck the young pedestrian while she was walking with her family.⁹⁷ The driver’s record was significantly blemished, despite Uber’s background check.⁹⁸ Uber claims to have

<http://www.politico.com/blogs/media/2014/11/the-stoning-of-ubers-emil-michael-199008> (describing the comments as being “unsavory” but not indicative of a real intent to invade privacy).

⁹³ Kashmir Hill, *‘God View’: Uber Allegedly Stalked Users for Party-Goers’ Viewing Pleasure*, FORBES (Oct. 3, 2014, 11:32 AM), <http://www.forbes.com/sites/kashmirhill/2014/10/03/god-view-uber-allegedly-stalked-users-for-party-goers-viewing-pleasure/>.

⁹⁴ Kai Ryssdal, *Uber’s Data Makes a Creepy Point About the Company*, MARKETPLACE (Nov. 18, 2014, 2:00 PM), <http://www.marketplace.org/topics/business/final-note/ubers-data-makes-creepy-point-about-company> (including an archived version of the blog posting embedded in the article, available at <https://web.archive.org/web/20141118192805/http://blog.uber.com/ridesofglory>).

⁹⁵ Carolyn Said, *Internal Uber E-mails Reflect Company’s Brash Reputation*, SFGATE (Jan. 30, 2015, 5:28 PM), <http://www.sfgate.com/business/article/Internal-Uber-e-mails-reflect-company-s-brash-6051762.php>.

⁹⁶ *Safe Rides, Safer Cities*, UBER, <https://www.uber.com/safety> (last visited Sept. 19, 2015).

⁹⁷ Complaint for Damages and Demand for Trial by Jury at 4, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979, 2014 WL 285058 (Cal. Super. filed Jan. 27, 2014). See Kale Williams & Kurtis Alexander, *Uber Sued Over Girl’s Death in S.F.: Family Says Firm’s App Violates Distracted-Driving Laws*, SFGATE (Jan. 28, 2014, 12:42 PM), <http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php>.

⁹⁸ See Joe Fitzgerald Rodriguez, *Broken Bodies, Broken Lives; Lax Rideshare Regulations Put Drivers, Passengers, and Pedestrians At Risk*, S.F. BAY GUARDIAN *continued . . .*

offered its condolences to the family privately, but its public silence on the matter was perceived by some as corporate heartlessness.⁹⁹ Uber denied responsibility for the fatal incident, claiming that the driver was not then performing TNC services because he was not transporting a rider or on his way to pick one up, though he was logged in to the Uber app.¹⁰⁰ The dispute was eventually settled for an undisclosed amount,¹⁰¹ and California has amended its TNC regulations to close this insurance gap in that state.¹⁰²

Incidents of reported driver sexual assaults on riders have been piling up.¹⁰³ These tragic occurrences are not fully representative of the aggregate rider experience,¹⁰⁴ but they are memorable and have led

ONLINE, Jan. 28, 2014, <http://www.sfbg.com/2014/01/28/broken-bodies-broken-lives>.

⁹⁹ See Joe Fitzgerald Rodriguez, *Uber Didn't Have the Decency to Offer Personal Condolences to Sofia Liu's Family*, S.F. BAY GUARDIAN ONLINE, Mar. 7, 2014, <http://www.sfbg.com/UberSorry>. But see *Statement On New Year's Eve Accident*, UBER BLOG (Jan. 1, 2014), <http://blog.uber.com/2014/01/01/statement-on-new-years-eve-accident/>.

¹⁰⁰ Answer and Affirmative Defenses of Defendants at 6, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. filed May 1, 2014).

¹⁰¹ See *Liu v. Uber Techs., Inc.*, No. CGC-14-536979, 2014 WL 285058 (Cal. Super. Jan. 27, 2014) (showing a Notice of Entry of Order Granting Petition to Approve Compromise of a Minor's Claim on the docket dated Sept. 24, 2015). See also Kia Kokalitcheva, *Uber Reaches Tentative Settlement in Wrongful Death Lawsuit*, FORTUNE, July 15, 2015, <http://fortune.com/2015/07/15/uber-settlement-death-lawsuit/>.

¹⁰² Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transp. Servs., 2014 WL 6791595, at *15 (Cal. P.U.C. 2014) (expanding insurance requirements to include "Period 1").

¹⁰³ See generally Complaint at 11–12, *Ho v. Uber Techs., Inc.*, No. 2014-L-003219, 2014 WL 1084528 (Ill. Cir. Ct. filed Mar. 19, 2014) (alleging common carrier liability against the company). See also Complaint for Negligence and Fraud at 33, *Doe v. Uber Techs., Inc.*, No. 3:15-cv-00424, 2015 WL 363160 (N.D.Cal. filed Jan. 29, 2015) (alleging common carrier liability against the company); see also Allison Pohle, *Boston Uber Driver Charged with Sexual Assault*, BOSTON.COM (Feb. 9, 2015, 1:04 PM), <http://www.boston.com/news/2015/02/09/boston-uber-driver-charged-with-sexual-assault/mk9JpGjETqs5nMtqfvHDCJ/story.html>; Steve Schmadeke & Michelle Manchir, *Prosecutors: UberX Driver Told Woman After Sex Assault, 'I Made You Happy'*, CHI. TRIB., Dec. 30, 2014, <http://www.chicagotribune.com/news/local/breaking/chi-former-uber-driver-charged-in-november-sexual-assault-of-customer-20141229-story.html>; Perry Stein, *Uber Driver Charged With Sexually Assaulting Passenger in D.C.*, WASHINGTON CITY PAPER, Jul. 28, 2014, <http://www.washingtoncitypaper.com/blogs/citydesk/2014/07/28/uber-driver-charged-with-sexually-assaulting-passenger-in-d-c/>.

¹⁰⁴ See James Cook, *Despite the Scary Rape Headlines, Uber is Probably Still the Safest Way to Order a Taxi*, BUSINESS INSIDER UK (Dec. 8, 2014, 12:24 PM), <http://uk.businessinsider.com/despite-its-problems-uber-is-still-the-safest-way-to-order-a-taxi-2014-12#ixzz3Laq43kjp> ("[D]espite a series of recent high-profile

continued . . .

some commenters to describe Uber's "safe rides fee"¹⁰⁵ as an insult to riders.¹⁰⁶ Uber has faced consumer legal action for misrepresenting the level of the insurance and driver background checks it provides to the benefit of consumers,¹⁰⁷ and for deceptively charging a twenty percent gratuity fee "for the driver" but keeping "a substantial portion of this additional charge for itself as its own additional revenue and profit."¹⁰⁸

Long before it agreed to temper its controversial surge pricing policy, where fees temporarily escalate in response to rider demand and in order to incentivize drivers to become available,¹⁰⁹ Kalanick poked fun at surprised Uber customers for voicing their complaints.¹¹⁰ Uber faced significant backlash when it stumbled over its surge pricing policy by initially charging escalated fares to riders who were trying to flee the area near the Sydney hostage crisis.¹¹¹

Taxicab operators have filed suit against Uber for unfair and deceptive competition, for charging driver gratuity fees to riders that are not paid to drivers, and for RICO violations based on expansion using income obtained through these unlawful practices.¹¹² The private RICO claims based on the gratuity charges were dismissed for lack of

incidents—some involving assaults allegedly committed by Uber drivers—Uber remains one of the safest, if not *the safest*, ways to order a car.”)

¹⁰⁵ *What Is the Safe Rides Fee?*, UBER SUPPORT, <https://web.archive.org/web/20150110234259/https://support.uber.com/hc/en-us/articles/201950566-What-is-the-Safe-Rides-Fee-> (last visited Feb. 12, 2015) (accessed by searching for URL in the Internet Archive index).

¹⁰⁶ Quentin Fottrell, *Is Uber's \$1 'Safe Rides Fee' An Insult To Passengers?*, MARKETWATCH (Dec. 9, 2014, 2:49 PM ET), <http://www.marketwatch.com/story/is-ubers-1-safe-rides-fee-an-insult-to-passengers-2014-12-09>.

¹⁰⁷ Class Action Complaint for Damages and Equitable Relief at 8, *Sabatino v. Uber Techs., Inc.*, No. 3:15-cv-00363, 2015 WL 329036 (N.D. Cal. filed Jan. 26, 2015) (seeking class action certification and damages for violations of the Cal. Bus. & Prof. Code §§ 17200, 17500, and 1770, et seq.).

¹⁰⁸ *Ehret v. Uber Techs., Inc.*, 68 F.Supp. 3d 1121, 1127 (N.D. Cal. 2014) (denying dismissal of all claims except breach of contract for lack of damages and quoting *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6354534, at *17 (N.D. Cal. Dec. 5, 2013)).

¹⁰⁹ See *What is surge pricing?*, *supra* note 19 and accompanying text.

¹¹⁰ Nick Vadala, *Uber CEO Mocks 'Surge Pricing' Complaints on Facebook*, PHILLY.COM (Dec. 18, 2013, 3:33 PM), <http://www.philly.com/philly/blogs/entertainment/Uber-CEO-mocks-surge-pricing-complaints-on-Facebook.html?c=r>.

¹¹¹ Alison Griswold, *Uber Surged Prices During the Sydney Hostage Crisis. It Needs to Do Better*, SLATE (Dec. 15, 2014, 7:05 PM), http://www.slate.com/blogs/moneybox/2014/12/15/uber_sydney_hostage_crisis_it_s_time_for_uber_to_re_evaluate_how_it_prices.html.

¹¹² Amended Complaint at 31–35, *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-cv-10769-NMG, 2014 WL 5359400 (D. Mass. July 8, 2014).

proximate cause to show direct injury.¹¹³ Uber has also been accused of deliberately conflating its own services with that of taxicabs in its advertisements.¹¹⁴ In one suit, the taxicab plaintiffs charged Uber with false advertising where its blog posting led consumers to believe that taxicabs were operating without valid insurance.¹¹⁵

These examples serve to illustrate some of the probable biases that lawmakers carry when deciding whether and how to deal with TNCs. Consumer demand should not be invoked to forgive all manner of sins, but it cannot be ignored.¹¹⁶ TNCs should be regulated in a way that adequately addresses what consumers want as well as what consumers do not know they want until they realize they do not have it.¹¹⁷ TNCs should not be disfavored at the expense of innovation and competition; the public simply will not allow that to happen quietly.¹¹⁸

In recognition of consumer demand and despite all of Uber's reputational troubles, analysts have ventured as high as \$40 billion valuation for the company.¹¹⁹ Still, these investors "will be incredibly

¹¹³ *Bos. Cab Dispatch*, 2015 WL 314131, at *7–9 (granting dismissal of claims under 18 U.S.C. § 1962(b) and (c), but denying dismissal under 18 U.S.C. § 1962(a)).

¹¹⁴ *Yellow Grp. LLC*, 2014 WL 3396055, at *5 (granting in part and denying in part defendant's motion to dismiss, claims with respect to Taxi Affiliation plaintiffs surviving the motion).

¹¹⁵ Civil Action Complaint at 40–44, *Checker Cab Phila., Inc. v. Uber Techs., Inc.*, No. 2:14CV07265, 2014 WL 7277272 (E.D. Pa. Dec. 23, 2014).

¹¹⁶ See FTC Letter to Jacques P. Lerner, Gen. Counsel, D.C. Taxicab Comm'n at 3 (June 7, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612detaxicab.pdf ("Consumers benefit from competition between traditional and new products and services, and from new methods of delivering services. Regulations therefore need to be reviewed and revised periodically to facilitate and encourage the emergence of new forms of competition.").

¹¹⁷ See *id.* ("A forward-looking regulatory framework should allow new and innovative forms of competition to enter the marketplace unless regulation is necessary to achieve some countervailing pro-competitive or other benefit, such as protecting the public from significant harm."). See also Martin Di Caro, *Regulators, Cabbies, Uber Agree: Illegal Street Hails Have To Stop*, WAMU 88.5 (Aug. 18, 2014), http://wamu.org/news/14/08/18/regulators_cabbies_uber_agree_on_somethin_g_illegal_street_hails_have_to_stop ("'Illegal street hails are really driven by the consumer. The consumers understand these brands. The drivers advertise themselves as such,' said Roy Spooner, the general manager of Yellow Cab Company, based in Northeast D.C. 'The consumers have not seen the negative side of this. But should you have a liability situation and you can't be compensated, then you'd start to see it in a different way.'").

¹¹⁸ Cohen, *supra* note 78, at 3.

¹¹⁹ See Serena Saitto, *Uber Valued at \$40 Billion in \$1.2 Billion Equity Funding*, BLOOMBERG BUS. (Dec. 4, 2014), <http://www.bloomberg.com/news/articles/2014-12-04/uber-valued-at-40-billion-with-1-2-billion-equity-fundraising>.

sensitive to any bumps in its growth performance”¹²⁰ and Uber’s current upward trajectory comes with no guarantee of continued success, with competitors like the “softer, friendlier” Lyft prepared to capitalize on Uber’s “questionable corporate character.”¹²¹

Uber’s decision to hire political strategist and former presidential advisor, David Plouffe, is expected to prevent, or at least smooth, many problems with consumers and regulators.¹²² Uber began to adjust its tone earlier this year when Kalanick admitted that they “haven’t always gotten it right,” referencing user data privacy practices.¹²³ This is a possible sign that Plouffe has helped the company¹²⁴ recognize “that they [have] outgrown the behaviors that served them well as an upstart” and “might still have the ability to surprise [society] with how fully they have earned the permission that [it] has granted them.”¹²⁵

3. *Uncertainty does not excuse inaction*

There are many developing and unknown possibilities regarding the future of TNCs, and the following samples merely represent the vast unknown potential for new, difficult to regulate, services.

¹²⁰ Derek van Bever, *Uber Needs Our Permission to Grow*, HARV. BUS. REV. (Feb. 9, 2015), <https://hbr.org/2015/02/uber-needs-our-permission-to-grow> (discussing Alfred Chandler’s theory that “Companies need society’s permission to grow.”).

¹²¹ Michael Carney, *Can Nice Guys Win? Lyft’s Softer Side Could Be its Advantage*, PANDO DAILY (Dec. 4, 2014), <http://pando.com/2014/12/04/can-nice-guys-win-lyfts-softer-side-could-be-its-advantage/>.

¹²² See Mike Isaac, *Uber Picks David Plouffe to Wage Regulatory Fight*, N.Y. TIMES (Aug. 19, 2014), http://www.nytimes.com/2014/08/20/technology/uber-picks-a-political-insider-to-wage-its-regulatory-battles.html?_r=0.

¹²³ Mike Isaac, *Hard-Charging Uber Tries Olive Branch*, N.Y. TIMES (Feb. 1, 2015), http://www.nytimes.com/2015/02/02/business/hard-charging-uber-tries-olive-branch.html?_r=0.

¹²⁴ Mark J. Miller, *Uber Swaps Brass Knuckles for Soft Handshakes in Local Lobbying*, BRAND CHANNEL (Feb. 2, 2015), <http://www.brandchannel.com/home/post/2015/02/02/150202-Uber-Contrite.aspx> (“The shift in attitude may be partially driven by Uber’s new Senior Vice President for Political Strategy, David Plouffe.”).

¹²⁵ van Bever, *supra* note 120.

UberChopper can whisk the wealthiest of riders away from Manhattan and transport them to the Hamptons, or perhaps back again to see Billy Joel at Madison Square Garden.¹²⁶ More commonly applicable, TNCs are toying with the idea of package delivery services—¹²⁷ faster than mailing but less ominous than drones? In the distant but not unforeseeable future of 2035, unmanned vehicles may be carting riders around town.¹²⁸ There are murmurings of potential conflicts between Uber and its major investor, Google, over the robot car concept, but will the two really be adversaries, partners, or both?¹²⁹

Unpredictability is logically unnerving for lawmakers, but that is not a great excuse for the total inaction—or fight to preserve the status quo—that has been on display.¹³⁰ Firms like Uber, Lyft, Sidecar (Uber’s best known competitors),¹³¹ Airbnb (like TNCs, but for overnight accommodations),¹³² and others that are leading the charge to maximize efficiency through “sharing economies” will do just that: lead others to find ways to make innovative connections and disrupt old

¹²⁶ *Uber to the Hamptons and Down the Shore*, UBER BLOG (July 1, 2014), <http://blog.uber.com/nyc/uberchopper-hamptons-shore-2014>.

¹²⁷ See generally Alyson Shontell, *I Just Tried Uber’s New Delivery Service ‘Rush’ And It Got Me My Package In 20 Minutes*, BUSINESS INSIDER (Oct. 23, 2014, 5:46 PM), <http://www.businessinsider.com/uber-rush-review-2014-10>. See also Mike Isaac, *Sidecar, a Ride-Hailing Start-Up, Pushes Into Package Delivery*, N.Y. TIMES BITS BLOG (Feb. 9, 2015, 2:39 PM), <http://bits.blogs.nytimes.com/2015/02/09/sidecar-a-ride-hailing-start-up-pushes-into-package-delivery/>.

¹²⁸ See Kara Swisher, *Letter From Silicon Valley: Man and Uber Man*, VANITY FAIR NEWS (Nov. 5, 2014, 12:00 AM), <http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy>.

¹²⁹ See Mike Isaac, *A Prickly Partnership for Uber and Google*, N.Y. TIMES (Feb. 8, 2015), <http://www.nytimes.com/2015/02/09/technology/a-prickly-partnership-for-uber-and-google.html> (describing the current and future relationship dynamic as a possible “co-opetition.”).

¹³⁰ See *infra* Part B.

¹³¹ 2013–2014 REVENUE LAWS STUDY COMM., REP. TO THE 2015–2016 GEN. ASSEMB. OF N.C., 2015 SESS., at 15 (2015), available at <http://www.ncleg.net/documentsites/committees/revenuelaws/meeting%20document%20s/2013-2014%20meeting%20documents/report%20to%20the%202015-16%20general%20assembly.pdf> (describing “TNC[s], like Uber and Lyft, are national companies that recruit drivers to join their networks.”) See also Rauch & Schleicher, *supra* note 1, at 13 (“[P]erhaps most famously, services like Uber, Lyft and SideCar connect different types of motorists -- from “black car” limousine drivers to ordinary car owners -- with riders seeking taxi services.”)

¹³² See 2013–2014 REVENUE LAWS STUDY COMM., *supra* note 131, at 13 (discussing “the short-term rental industry, which has been popularized by Airbnb, an Internet platform that connects homeowners with potential guests seeking to rent out a room or an entire home as an alternative to traditional lodging establishments.”).

systems.¹³³

III. ANALYSIS

A. The Purported Market Failures of Taxicabs and How They Relate to TNCs

Incumbent taxicab operators argue that the only way to level the playing field is to apply each existing regulation to both taxicabs and TNCs.¹³⁴ There are two concerns that every locality should regulate quickly and thoroughly in order to protect public safety: insurance and driver background checks. TNCs have demonstrated that they do not have sufficient incentives to address these issues independently,¹³⁵ and rider-consumers are likely to assume that they are protected at a higher level than is true.¹³⁶ The remainder of the regulated concepts are open to debate, but there are strong arguments in favor of allowing the market to handle these other concerns and, therefore, to not regulate these issues for TNCs and, in most cases, to deregulate these issues for taxicabs.

1. Public safety concerns that justify regulation of TNCs

a. Insurance

Taxicabs must carry minimum liability insurance.¹³⁷ Riders might

¹³³ Ranchordàs, *supra* note 1, at 43 (“Think about Uber, Lyft, Airbnb, symbols of contemporary innovation and a new urban trend of sharing and collaborating. In the world of sharing economy, there appear to be infinite possibilities to be an entrepreneur.”).

¹³⁴ See Complaint at 2–3, *Bos. Taxi Owners Ass’n, Inc. v. Uber Techs., Inc.*, No. 15-10100-NMG, 2015 WL 505397 (D. Mass. Jan. 16, 2015) (“[T]he City now permits by law the de facto taxi companies to operate without complying with the taxi regulations even though they engage in the same business as Plaintiffs” and “proposed changes to an existing regulation . . . if implemented will create an irrational, two tiered regulatory system.”). See also Complaint at 76–77, *Checker Cab Phila., Inc. v. Uber Techs., Inc.*, No. 2:14CV07265, 2014 WL 7277272 (E.D. Pa. Dec. 23, 2014) (Plaintiffs prayers for relief include “enjoining Defendants from continuing their fraudulent scheme to provide unauthorized transportation service in Philadelphia and elsewhere in Pennsylvania.”).

¹³⁵ See generally Complaint, *supra* note 17 (detailing claims of Uber’s misleading statements with regard to its safety measures).

¹³⁶ See *id.* at 9 (“The representations made by Uber set forth in the foregoing paragraphs are untrue or misleading in violation of California law. Viewed separately or together, the representations are likely to mislead consumers into believing that Uber does everything it can to ensure their safety” when Uber’s actual safety measures are below the taxicab industry standard.)

¹³⁷ See, e.g., COLO. CODE REGS. § 6007(a)(I) (2015).

be shocked to know just how minimal that requirement can be.¹³⁸ It is possibly beyond debate that TNCs or their drivers should also be required to carry minimum liability insurance.¹³⁹

“The sticking point in the debate . . . has been over a gap in insurance coverage during the period when TNC drivers have their smartphone app on but have not been matched with a ride[r].”¹⁴⁰ Because “most personal auto policies have livery exclusions that will deny coverage if a person is carrying a passenger for hire,” the TNC, rather than the individual driver, should be required to provide insurance coverage whenever the driver is logged into the app.¹⁴¹

¹³⁸ See D.C. MUN. REGS. tit. 31, §900.2 (2015) (requiring \$20,000 for bodily injury or death and \$5,000 for property on all judgments arising from the same claim). See also 52 PA. CODE § 32.11(b) (2015) (requiring only \$15,000 bodily injury per person, \$30,000 bodily injury per accident, and \$5,000 for property damage per accident for carriers transporting fewer than 16 passengers).

¹³⁹ See, e.g., *Ga. House Passes Uber Insurance Bill*, 11ALIVE WXIA (Mar. 3, 2015, 6:33 PM), <http://www.11alive.com/story/news/politics/2015/03/03/uber-insurance-house-bill/24338623/> (“The Georgia House of Representatives overwhelmingly passed a bill Tuesday requiring insurance for drivers. The size of the vote signaled a pretty strong desire at the Capitol to make Uber, Lyft and other ride companies play by at least some set of rules.”).

¹⁴⁰ Don Jergler, *California Commissioner Wants Insurance Burden on Ridesharing Companies*, INSURANCE JOURNAL (Apr. 9, 2014), <http://www.insurancejournal.com/news/west/2014/04/09/325918.htm> (discussing the unavailability of commercial insurance products to cover TNC drivers individually and recommending specific TNC insurance requirements).

¹⁴¹ *Id.*

In California, TNC drivers must now be covered by the TNC insurance policy when they are in any one of three phases of insurance concern:¹⁴² (1) Pre-Engagement (the app is open, driver is available but not yet engaged with a rider); (2) Engaged (no rider is in the vehicle, but the driver has connected with a rider and is or will be en route for pick up); and (3) Transporting (from pick up until the rider has safely exited the vehicle). Different minimum levels of coverage apply to each phase.¹⁴³ Lawmakers must be made aware of the gap that once existed in the pre-engagement stage in California, and they should mindfully choose whether or not to close it based on the recommendations of the insurance industry¹⁴⁴ and local social values.

b. Driver background checks

Taxicab operators typically must undergo comprehensive criminal background checks.¹⁴⁵ In some locations, the systems used are first-in-class¹⁴⁶ (“live scan” fingerprint analysis),¹⁴⁷ offering a high level of

¹⁴² Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transp. Servs., No. 14-11-043, 2014 WL 6791595, at *15 (Cal. P.U.C. Nov. 25, 2014) (expanding insurance requirements to include “Period 1”).

¹⁴³ CAL. PUB. UTIL. CODE § 5433 (West 2015) (requiring \$50,000 for death and personal injury per person, \$100,000 for death and personal injury per accident, and \$30,000 for property damage during phase one, but requiring \$1,000,000 for death, personal injury, and property damage during phases two and three).

¹⁴⁴ See, e.g., Jergler, *supra* note 140 (listing the recommendations of California Insurance Commissioner, Dave Jones).

¹⁴⁵ See, e.g., Complaint, *supra* note 17, at 10 (“[T]he taxi regulators in the most populous parts of California require drivers to undergo criminal background checks using fingerprint identification employing a technology called ‘Live Scan.’ Taxi regulators in Uber’s home town of San Francisco, as well as California’s most populous city - Los Angeles, the rest of the 10 most populous cities in California, and all 34 cities in Orange County all require Live Scan.”).

¹⁴⁶ See *id.* (“The fingerprints allow a biometric search of the California Department of Justice’s criminal history databases and the option to obtain a search of the Federal Bureau of Investigation’s database of multistate criminal history information. The process of using a biometric identifier to search government databases through the California Department of Justice (“Live Scan/DOJ Process”) is the gold standard for a background check process in California.”). See also *Fingerprint Background Checks*, CAL. DEP’T OF JUSTICE, OFFICE OF THE ATT’Y GEN., <http://oag.ca.gov/fingerprints> (last visited Sept. 21, 2015) (explaining the process of authorized live scan operators obtaining an applicant’s criminal history record directly from the Department of Justice).

¹⁴⁷ See S.F., CAL., TRANSP. CODE art. 1100, div. 2, § 1103(c)(1)(A) (2015) (requiring drivers to provide fingerprints when applying for permits). See also *How to Become a Taxi Driver*, SAN FRANCISCO MUN. TRANSP. AGENCY,

awareness of both driving history and potential for criminal behavior, and certainty of identity, though cities may be free to disregard red flags.¹⁴⁸ Taxicab operators are also subject to occasional review for changes to their driving and criminal records, such as when applying for renewal of permits.¹⁴⁹ This promotes rider safety over the long term, but the effectiveness of this policy is overstated because the verifications are infrequent enough to allow considerable gaps in awareness.¹⁵⁰

TNCs advertise the use of background checks, but the extent and reliability is at least questionable.¹⁵¹ This is an area of legitimate concern, but the specific requirements applied to taxicabs are not necessarily the only answer for TNCs.¹⁵² Real time rider and driver feedback may ultimately prove more effective for rider safety than even the most stringent ex ante driver screenings.¹⁵³ Replicating the rules for taxis and applying them blindly to TNCs ignores the “strong incentive [for a TNC] to provide a safe environment for its users. [A TNC’s] very

<http://www.sfmta.com/services/taxi-industry/become-taxi-driver> (last visited Feb. 24, 2015) (requiring applicants to obtain a fingerprint and background check from a Live Scan location).

¹⁴⁸ S.F., CAL., TRANSP. CODE art. 1100, div. 2, § 1103(c)(2)(F) (2015) (“The SFMTA may, in its discretion, issue a permit notwithstanding prior convictions if, following review of an individual case, it determines that the applicant or Permit Holder does not pose a current risk to public safety.”).

¹⁴⁹ S.F., CAL., TRANSP. CODE art. 1100, div. 2, § 1103(c)(3)(A) (2014) (“Drivers have an affirmative duty to report any criminal convictions that would be a basis for denying a permit pursuant to Section 1103(c)(2)(F). The SFMTA may refuse to renew a permit if the Permit Holder would not be eligible to receive a new permit pursuant to Section 1103(c)(2)(F).”).

¹⁵⁰ Elyce Kirchner, David Paredes & Scott Pham, *Badly Behaving San Francisco Taxi Cab Drivers Face Few Consequences*, NBC BAY AREA INVESTIGATIVE UNIT (Feb. 11, 2015, 3:41 PM), <http://www.nbcbayarea.com/investigations/Badly-Behaving-San-Francisco-Taxi-Cab-Drivers-Face-Few-Consequences-266516021.html> (revealing that the San Francisco Municipal Transit Authority “does not regularly pull drivers’ traffic records” and “rarely takes significant action on complaints”).

¹⁵¹ See Complaint, *supra* note 17, at 6–15 (criticizing Uber’s statements and representations about its commitment to rider safety because the company opposed and defeated legislation that would require it to use the Live Scan/DOJ process, and because the company does not use a comparable resource).

¹⁵² See Matthew Feeney, *Is Ridesharing Safe?*, 767 CATO INST. POLICY ANALYSIS 1, 1 (Jan. 27, 2015) <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa767.pdf> (“An analysis of the safety regulations governing vehicles for hire does not suggest that ridesharing companies ought to be more strictly regulated. It does highlight, however, that in many parts of the country lawmakers and regulators have not adequately adapted to the rise of ridesharing, which fits awkwardly into existing regulatory frameworks governing taxis.”).

¹⁵³ See *id.* at 4.

business model depends on consumer trust.”¹⁵⁴ Negative TNC incidents have garnered much publicity,¹⁵⁵ but are not representative of the aggregate rider experience and distract from the reality that some danger is inherent in both TNC and taxicab rides.¹⁵⁶ No background check is capable of preventing all bad results,¹⁵⁷ despite the potential for political embarrassment of laxity in the face of scandal.¹⁵⁸

Regulators should insist that TNCs take great care to protect their customers,¹⁵⁹ but simply providing a false sense of safety¹⁶⁰ by insisting on fingerprinting may be a more expedient than effective answer. The background checks currently performed by TNCs, combined with published driver ratings, are likely sufficient to provide a level of safety that is equivalent to that of taxicabs.¹⁶¹ More importantly, regulators should recognize that TNCs already provide effective driver screenings,¹⁶² and should consider requiring both TNCs and taxicabs to

¹⁵⁴ Matthew Feeney, *Stop Attacking Uber for Lax Safety Standards*, WASH. POST, Dec. 19, 2014, <http://www.washingtonpost.com/posteverything/wp/2014/12/19/stop-attacking-uber-for-lax-safety-standards/>.

¹⁵⁵ See generally Sriram Sharma, *Delhi Woman’s Petition to Uber CEO Goes Viral*, HUFFINGTON POST (Sept. 12, 2014, 19:40 IST), [http://www.huffingtonpost.in/2014/12/09/change-petition-\(uber_n_6293578.html](http://www.huffingtonpost.in/2014/12/09/change-petition-(uber_n_6293578.html) (article exemplifying international attention garnished by a specific negative TNC incident).

¹⁵⁶ See *supra* notes 154–55 and accompanying text.

¹⁵⁷ See *supra* notes 154–55 and accompanying text.

¹⁵⁸ Rodriguez, *supra* note 99 (“The hearing on rideshares . . . at the Board of Supervisors Neighborhood Services and Safety Committee yesterday [Thursday, March 6, 2014] centered on the insurance and business effects of Uber on taxi services,” and local officials “grilled” regulatory authorities “on questions sparked by Sofia Liu’s death.”).

¹⁵⁹ See Lauren K. Ohnesorge, *A New Road Map*, TRIANGLE BUSINESS JOURNAL (Jan. 23, 2015, 6:00 AM), <http://www.bizjournals.com/triangle/print-edition/2015/01/23/a-new-road-map.html?page=all> (“In the end, none of that will matter if city, county and state leaders are face with a safety breach of these services in the Triangle. Overnight, the chatter will change and so will the appetite to accommodate these shared services. In essence, the longer lawmakers wait to create the regulatory framework of shared services, the riskier it will get for the shared economy.”).

¹⁶⁰ Feeney, *supra* note 152, at 7 (“Critics of the FBI fingerprint database point to its incomplete or inaccurate information. In July 2013 the National Employment Law Project (NELP) released a study on the FBI’s employment background checks and found that “FBI records are routinely flawed.”).

¹⁶¹ *Id.* at 8 (“Uber and Lyft both have criteria for background checks that are stricter than the requirements for taxi driver applicants in many American jurisdictions. It cannot be reasonably claimed that an UberX or Lyft driver who has been cleared through a thorough background check is more of a danger to passengers than a taxi driver in most of America’s most populous cities.”).

¹⁶² See, e.g., *id.* at 5–8 (discussing driver screening procedures used by Uber and Lyft).

increase the frequency by which each verifies driver records and criminal activity.¹⁶³

2. *Issues that can be resolved by the market or existing laws*

a. *Barriers to entry: licensing and medallions*

The reasons for limiting the number of taxicabs operating in a city or county are outdated, and should be reconsidered and largely discarded.¹⁶⁴ Congestion and pollution are not ameliorated by these limits¹⁶⁵, which serve instead to protect taxicab operators from competition and medallion owners from losing the value of their investments.¹⁶⁶

Taxicab operators should be allowed to enter the TNC market by becoming TNC drivers in the alternative.¹⁶⁷ If allowed, taxicabs could easily switch from one to the other and back again.¹⁶⁸ Riders could use an app to make an informed selection of a taxicab that is acting as a TNC driver, and that driver should be allowed to charge TNC rates for that transaction.¹⁶⁹ This approach would allow taxicabs and consumers

¹⁶³ See generally Kirchner, Paredes & Pham, *supra* note 150.

¹⁶⁴ See DEIGHTON-SMITH, *supra* note 22, at 205 (“The taxicab industry continues to be highly regulated in the United States. Some of that regulation – particularly entry restraints – is not strictly necessary . . .”).

¹⁶⁵ FRANKENA & PAUTLER, *supra* note 26, at 5 (“it has been argued that, because taxicabs cause congestion and pollution externalities, restrictions on entry and cruising would increase efficiency. Our review of the evidence leads us to reject this conclusion.”). See also DEIGHTON-SMITH, *supra* note 22, at 200 (“As of 2007, the general description of the taxicab industry and taxicab regulation in the United States remains much as it was when Frankena and Pautler described it in 1984.”).

¹⁶⁶ DEIGHTON-SMITH, *supra* note 22, at 200–01 (“The stringency of entry regulation can manifest itself in the value of taxicab licenses. In a competitive, open entry market, the value of the right to serve the market would be zero. However, if the right to serve is restricted, the value of that right is capitalized in the price of the license,” and the “fact that license values are substantial in several U.S. cities . . . implies that entry restrictions have raised the rate of return in taxi service provision above that in other lines of endeavor and that prices are likely higher and the number of trips lower than they would be in the absence of regulation.”).

¹⁶⁷ Moorthy, *supra* note 69 (quoting a taxicab company president who “advises his drivers to sign up for Uber in addition to fulfilling their normal duties” as saying “We encourage all our drivers to sign up for Uber, so if I lose a customer from Charlene’s, that customer will come back to us through Uber.”).

¹⁶⁸ *Id.*

¹⁶⁹ Andrew Meaney, *Is the Ride Right? Transportation Network Companies and Taxicabs*, OXERA (Aug. 2014), <http://www.oxera.com/getmedia/a5018465-4b24-4f96-b21f-c1661838d1c9/Transportation-network-companies-and-taxicabs.pdf.aspx?ext=.pdf> (Explaining that “taxis will be unable to match the

to have the best of both worlds.¹⁷⁰ First, by joining the TNC movement whenever it is profitable to do so: when the going rate exceeds what a taxicab can obtain by controlled prices.¹⁷¹ Second, by enjoying the benefits of taxicab status when that is preferable: when the controlled price is more than what can be obtained via TNC,¹⁷² whether by responding to street hails or accepting fares prearranged traditionally by telephone and radio dispatch.

Taxicab drivers could be permitted to drive for TNCs, or use their own apps to connect with riders.¹⁷³ In order to compete with TNCs, taxicab companies may need to cooperate or combine by consolidating their apps to one or a few within an area, depending on the local market demand.¹⁷⁴ Alternatively, cities or counties can offer their own app to facilitate taxicab digital dispatch.¹⁷⁵ This approach would allow the market for transportation services to determine what precise mix of TNCs and taxicabs is best.

As for the vocal medallion owners, these investors do not “have a protected property interest in the market value of their medallions”¹⁷⁶ beyond that of any other private investor, and the market should be

attractive prices offered by TNCs competing against one another. If, instead, price floors for taxis are removed, all passengers may benefit from taxis cutting prices to compete with TNCs. The motivation for a maximum price for taxi services would remain, but only for services where taxis have a point-of-sale advantage—i.e. picking up passengers from a taxi rank, or when cruising.”).

¹⁷⁰ Letter from FTC to Jacques P. Lerner, Gen. Counsel, D.C. Taxicab Comm’n at 5–6 (June 7, 2013) (on file with author), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf (Recommending “against restricting the ways that applications and operators can associate with each other, which harms the public by limiting the ways that they can obtain taxi service.”).

¹⁷¹ *See generally* Meaney, *supra* note 169.

¹⁷² *Id.*

¹⁷³ Mark Guarino, *Chicago Plans App So Taxis Can Compete with Uber, Ridesharing Services*, REUTERS (Dec. 10, 2014, 9:51 PM EST), <http://www.reuters.com/article/2014/12/11/us-uber-chicago-idUSKBN0JP07Z20141211>.

¹⁷⁴ *See* Lydia DePillis, *Can Taxi Unions Build an App to Take On Uber?*, WASH. POST (Jan. 19, 2015), *available at* <http://www.washingtonpost.com/news/storyline/wp/2015/01/19/can-taxi-unions-build-an-app-to-take-on-uber/> (describing efforts to create a taxicab union backed app in order to compete with the market dominance of Uber).

¹⁷⁵ *See* Guarino, *supra* note 173 (developing an app that can be used by all city taxicabs in order to “level the playing field.”).

¹⁷⁶ *Bos. Taxi Owners Ass’n, Inc. v. City of Boston*, No. 15-10100-NMG, 2015 WL 505397, at *5 (D. Mass. Feb. 5, 2015) (denying preliminary injunction to plaintiff medallion owners under both the Takings and Equal Protection clauses).

allowed to adjust for the inflated price of limited medallions.¹⁷⁷

b. Vehicle standards including safety inspections and trade dress

Taxicab operators in most locations are required to affix permanent markings to their vehicles that include company information and identification numbers and, in some instances, must paint their vehicles a particular color.¹⁷⁸ Taxicabs also must meet certain quality standards based on age, inspections, and general safety standards.¹⁷⁹

Uber does not require their drivers to permanently alter the appearance of their vehicles, but does insist that basic service vehicles be newer than ten years old,¹⁸⁰ and does prescribe certain makes, models, and color combinations for its elevated services.¹⁸¹ Airports sometimes require TNC drivers to display trade dress while operating on airport property so that enforcement officers can tell the vehicles apart from those of ordinary motorists.¹⁸² That trade dress consists of a small, removable sign that, when displayed, can be viewed from a short distance,¹⁸³ but is easily removed or replaced by drivers, and can be obtained and replicated without any authorization.¹⁸⁴

Lyft, in its early operations, required its drivers to display a large pink, fuzzy mustache as part of a friendly branding strategy, meant in

¹⁷⁷ See DEIGHTON-SMITH, *supra* note 22, at 200–01.

¹⁷⁸ Civil Action Complaint at 27, *Checker Cab Phila., Inc. v. Uber Techs., Inc.*, No. 2:14CV07265, 2014 WL 7277272 (E.D. Pa. Dec. 23, 2014) (citing 53 PA. CONS. STAT. § 5714 (2014) and 52 PA. CODE § 1017.11 (2014) “A vehicle operated as a medallion taxicab . . . must be distinctively marked, numbered and painted for identification purposes, and must be equipped with a PPA-approved meter, GPS navigation system, panic button, dome light and protective shield.”).

¹⁷⁹ See Civil Action Complaint at 27–28, *Checker Cab Phila.*, 2014 WL 7277272 (describing age, mileage, inspections at intervals, and safety standards).

¹⁸⁰ *Drive With Uber—Earn Cash With Your Car! (Full-Time)*, UBER (Mar. 28, 2014), <https://newsroom.uber.com/drive-with-uber-earn-cash-with-your-car-6/>.

¹⁸¹ *Full Vehicle List*, DRIVE UBER NYC, www.driveubernyc.com/vehicles/full-list/ (last visited Sept. 12, 2015).

¹⁸² See Transportation Network Company Commercial Ground Transportation Non-Exclusive Operating Permit, SFOCONNECT, *available at* <https://www.sfoconnect.com/sites/default/files/tnc-permit.pdf> (last visited Feb. 27, 2015).

¹⁸³ See *TNC Trade Dress*, CAL. PUB. UTIL. COMM’N, http://www.cpuc.ca.gov/PUC/Enforcement/TNC/TNC_Trade_Dress.htm (last visited Feb. 27, 2015) (showing examples of trade dress in use, hyperlinked by organization).

¹⁸⁴ *Required Documents*, UBER SAN DIEGO, <http://sandiego.ubermovement.com/required-documents> (last visited Sept. 19, 2015).

part to signal safety to female riders,¹⁸⁵ but has since relegated the “glowstache” to dashboard windshield status.¹⁸⁶ Riders and drivers seem to prefer the inconspicuous approach.¹⁸⁷ Lawmakers should consider the extent to which street level enforcement of locally formulated TNC regulations would necessitate identification by trade dress.¹⁸⁸ The need is most apparent on airport properties,¹⁸⁹ but may be applicable in dense urban zones where TNCs may be tempted to solicit or accept street hails.¹⁹⁰

Vehicle safety standards may already be addressed by existing requirements for passenger vehicles, such as by annual safety inspections,¹⁹¹ and need be no more stringent for TNCs.¹⁹² High mileage has been cited to justify the need for higher standards applied to taxicabs, but TNCs already require that vehicles be relatively new.¹⁹³ TNC vehicle safety is already well promoted by driver ratings that are influenced by the quality of the vehicle, and periodic inspections may not actually lead to improved safety on the roads. However, TNCs have

¹⁸⁵ Christine Lagorio-Chafkin, *The Origin—and Evolution—of Lyft’s Pink Mustache*, INC. (Aug. 1, 2014), <http://www.inc.com/christine-lagorio/evolution-of-lyft-mustache.html>.

¹⁸⁶ Associated Press, *Lyft Drops Pink Furry Mustache, Debuts ‘Glowstache’*, N.Y. POST (Jan. 27, 2015, 10:51 AM), <http://nypost.com/2015/01/27/lyft-drops-pink-furry-mustache-debuts-glowstache/>.

¹⁸⁷ *See id.*

¹⁸⁸ *See generally* Complaint, *supra* note 17, at 19–23 (detailing Uber’s violations at airports, which give rise to the need for trade dress).

¹⁸⁹ *See id.* *See also* Letter from Michael R. Peevey, President, Cal. Pub. Util. Comm’n, to Travis Kalanick, UberX, RE: Transportation Network Companies Operating in California (June 10, 2014), *available at* <http://www.cpuc.ca.gov/NR/rdonlyres/10C10B82-F7CB-4990-9F0F-727CDEAAB7F0/0/LettertoTravisKalanickofUberX061014.pdf> (giving notification of multiple airport rule violations exacerbated by failure to display proper “trade dress”).

¹⁹⁰ Di Caro, *supra* note 117 (explaining that inspectors “have no way to effectively enforce against it” and that the officers want TNCs to register their vehicles and bear identifying decals).

¹⁹¹ *See, e.g., Vehicle Emissions & Safety Inspection*, N.C. DIV. OF MOTOR VEHICLES, <http://www.ncdot.gov/dmv/vehicle/registration/inspection/> (last visited Sept. 19, 2015) (requiring safety inspections annually before registration can be renewed for most vehicles).

¹⁹² *See* Feeney, *supra* note 152, at 8 (“Does the failure of Uber and Lyft to require regular inspections of all their vehicles constitute a significant lapse in safety standards? The available evidence says no.”).

¹⁹³ *See id.* (“Moreover, Uber requires that all cars using its app be 2004 model year or newer. Lyft does require that a driver applicant’s car undergo an in-person inspection before she can use the app to pick up passengers. In addition, Lyft requires its cars to be no older than the 2000 model year.”).

been willing to concede on inspection requirements.¹⁹⁴

c. Exclusive ability to accept street hails

Taxicabs typically connect with riders in old-fashioned ways: taking street hails or responding to requests made by phone calls.¹⁹⁵ Taxicabs seeking street hails must predict locations and times that will produce adequate fares; they congregate and wait, or they hover and drive slowly, concentrating around a popular center.¹⁹⁶ Since they lack the ability to connect with drivers in real time, they are inefficient; taxicabs must generate enough fares at peak moments to cover the expense of maintaining a vehicle that serves no other purpose in its down time.¹⁹⁷

TNCs differ in this respect because the vehicles used are taken from the reserve of private vehicles that might otherwise be left idle.¹⁹⁸ Drivers use their personal cars when they need them for other purposes—to get to their other job(s) in many cases—but they then offer them to riders when they do not personally need them and, importantly, when it is profitable to do so.¹⁹⁹ TNC drivers connect with potential riders digitally, usually at some distance.²⁰⁰ Riders use the app to connect with a driver a few minutes in advance of the need, allowing the driver to arrive at precisely the desired time.²⁰¹ With this arrangement, there is little need for guesswork as to where to be and when, and there is no need for inefficient, uncomfortable, and sometimes discriminatory, telephone requests or street hails.²⁰² There is still bound to be some circling by TNC drivers around locations likely to generate a fare within a few minutes (e.g., where a concert is about to end), but the elimination of street hailing avoids unnecessary

¹⁹⁴ Feeney, *supra* note 152, at 8–9.

¹⁹⁵ Letter from FTC to Brendan Reilly, Alderman, 42nd Ward, City Council, City of Chicago, at 3 (Apr. 15, 2014) (on file with author), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf.

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

¹⁹⁸ N.C. LAW REVENUES STUDY COMM., *supra* note 48, at 16.

¹⁹⁹ *See supra* notes 12–14 and accompanying text.

²⁰⁰ *See supra* notes 14–16 and accompanying text.

²⁰¹ *See supra* notes 14–16 and accompanying text.

²⁰² *See Accessible Taxi Case Goes to Discovery*, 17 CITY L. 104 (2011) (“A class action lawsuit was filed against the Taxi and Limousine Commission claiming that TLC, either directly or through arrangements with private entities, pervasively and continuously discriminated against mobility-disabled individuals. According to the complaint, only 1.8 percent of TLC medallion taxis were accessible to mobility-disabled individuals.”).

jockeying for prime positions, allows for continuous traffic flow, and removes the ability of drivers to deny transportation to riders for pernicious reasons.²⁰³

In urban centers, lawmakers may want to protect the ability of riders to obtain transportation-for-hire services by street hail.²⁰⁴ Taxicabs that must continue to comply with tight regulations should retain the right to accept street hails.²⁰⁵ Eventually, this method of connecting may become totally obsolete; it is of little relevance outside of select cities with strong urban cores.²⁰⁶ Mobile technology is ubiquitous to the point that using an app is a low barrier for riders to enter the transportation-for-hire market.²⁰⁷ Logically, would-be riders that are priced out of TNC use would face the same obstacle in paying for cabs, but could still connect with taxicabs via telephone. Where the need is greatest, street hails by taxicabs should be allowed to continue, though mass transit is often a viable option in these locations.²⁰⁸

d. Price controls

Flat rates in taxicabs—locally fixed prices—protect riders from price gouging.²⁰⁹ This seems to make sense when the gouging is the result of discrimination—charging higher fares depending on race, gender, disability, or other socially unacceptable reasons—but this does not stop taxicab operators from simply passing by unwanted street

²⁰³ *See id.*

²⁰⁴ Meaney, *supra* note 169, at 2.

²⁰⁵ *See generally* Bruce Schaller, *Entry Controls in Taxi Regulation: Implications of US and Canadian Experience for Taxi Regulation and Deregulation*, TRANSPORT POLICY, 490 (2007), available at <http://www.schallerconsult.com/taxi/entrycontrol.pdf>. (discussing the need for regulation of the street hail market because competition is absent and oversupply is rampant where riders take the first available cab).

²⁰⁶ *See id.* at 493 (comparing street hail cities such as New York and San Francisco with “lower-density” areas including San Diego and San Jose).

²⁰⁷ *See generally* *Mobile Technology Fact Sheet*, PEW RESEARCH CENTER (Jan. 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited Sept. 21, 2015) (breaking down the demographics of smartphone owners in the United States in 2014 and showing that, predictably, ownership is correlated with youth, education, and income).

²⁰⁸ *See generally* Madeline Stone, *The US Cities With the Best Public Transportation Systems*, BUSINESS INSIDER (Jan. 30, 2014, 4:31 PM), <http://www.businessinsider.com/cities-with-best-public-transportation-systems-2014-1> (ranking the top ten of “316 U.S. cities and thousands of neighborhoods . . . assigned a ‘Transit Score’” in ascending order: Portland, Los Angeles, Baltimore, Seattle, Chicago, Philadelphia, Washington D.C., Boston, San Francisco, and New York).

²⁰⁹ *See* FRANKENA & PAUTLER, *supra* note 26, at 3.

hailing riders, or ignoring requests from certain neighborhoods.²¹⁰ What flat rates truly provide is predictable operator income.²¹¹ Because consumers willing to pay more when transportation is scarce cannot do so with taxicabs, these constraints do not promote efficient and reliable access to riders.²¹²

Taxicabs must also install meters that are subject to quality control and inspection, whereas the TNC technology is ahead of the regulatory scheme.²¹³ TNC drivers rely on the TNC app for GPS tracking of distance traveled and a clock to measure the time traveled; the combination is then multiplied by the applicable rate.²¹⁴ Outdated laws should not be used to hinder competition by mandating the use of old technology in new business models.²¹⁵ TNC regulations should reflect this difference in technology, and taxicab regulations should be updated where progressive lawmakers allow taxicabs to operate as TNCs in the alternative.²¹⁶

Surge pricing allows TNCs to apply a higher rate when drivers are most in demand.²¹⁷ This produces significant frustration when the rates are not transparent,²¹⁸ but that is a problem addressed by existing laws, and surge pricing can be disallowed during emergencies.²¹⁹ TNCs and riders are learning from experience to find the thresholds of just how high prices can surge before consumers (and drivers) find alternatives.²²⁰

²¹⁰ See *id.* at 4 (“If fares are regulated, some categories of trips may be priced so low that they would involve losses for taxi firms. Firms might then refuse service even though most riders might be willing to pay enough to make the service profitable.”).

²¹¹ See *id.* at 83.

²¹² *Id.* at 4.

²¹³ See Complaint, *supra* note 178, at 121, 138–39 (alleging that the smartphone app is a meter where it measures time and distance to calculate fares).

²¹⁴ See Complaint, *supra* note 17, at 49.

²¹⁵ See DEIGHTON-SMITH, *supra* note 22, at 204.

²¹⁶ See Moorthy, *supra* note 69.

²¹⁷ See *supra* notes 19–20 and accompanying text.

²¹⁸ Nick Bilton, *Customers Out in the Cold Balk at Uber Surge Pricing*, N.Y. TIMES BITS BLOG (Dec. 16, 2013, 6:43 PM), <http://bits.blogs.nytimes.com/2013/12/16/customers-out-in-the-cold-balk-at-uber-surge-pricing/>.

²¹⁹ Mark Berman, *Why Uber Will Limit Its Surge Pricing During the Snow Emergency*, WASH. POST (Jan. 26, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/01/26/why-uber-will-limit-its-surge-pricing-during-the-snow-emergency/>.

²²⁰ Joe Fitzgerald Rodriguez, *Uber Drivers Say Rideshare Surge Pricing Backfired on New Year’s Eve*, S.F. EXAMINER (Jan. 2, 2015), <http://www.sfexaminer.com/sanfrancisco/uber-drivers-say-rideshare-surge-pricing-backfired-on-new-years-eve/Content?oid=2915795>.

TNC price regulations should be limited to: (1) requirements of transparency, such that the reasonable rider could discern the expected charges—a problem addressed in part by Uber’s price estimator; and (2) policies that address emergencies, whether by setting maximum multipliers, or by prohibiting surges entirely by allowing TNCs to increase driver pay but not rider fares during these times.

e. Discrimination

The importance of anti-discrimination laws and the difficulties of enforcement are not unique to the transportation-for-hire market, and TNCs can expect to be held to the same standard as any other business.²²¹

Discrimination by taxicabs is meant to be addressed by prohibiting the refusal of fares based on race and other unacceptable reasons.²²² Unfortunately, this behavior cannot be effectively prevented by regulations that allow taxicab operators to selectively respond to street hails and to choose whether to service neighborhoods of various demographics at their discretion.²²³ On the bright side, TNCs may actually reduce or eliminate race as a factor in accessing personal vehicle transportation, at least in part because drivers can rate passengers based on behaviors rather than on stereotypes.²²⁴

Taxicab drivers are unable to discriminate against disabled persons by avoiding neighborhoods, but the problem is not eliminated by existing regulations.²²⁵ Taxicabs may have strict requirements for making reasonable accommodations for riders, and some cities turn to

²²¹ See generally Danita L. Davis, *Taxi! Why Hailing A New Idea About Public Accommodation Laws May Be Easier Than Hailing A Taxi*, 37 VAL. U. L. REV. 929, 961–81 (2003) (discussing “ambiguities in public accommodation laws” and presenting solutions including a “model state public accommodation statute” and “municipal policy regarding taxi services”).

²²² *Id.* at 930.

²²³ *Id.* at 929 (describing “refusals to serve neighborhoods mostly occupied by minority residents and refusing black American fares altogether” in Chicago, and similar problems in New York and Washington, D.C.).

²²⁴ Rauch & Schleicher, *supra* note 1, at 52. See also Latoya Peterson, *Cab Drivers, Uber, and the Costs of Racism*, RACIALICIOUS (Nov 28, 2012), <http://www.racialicious.com/2012/11/28/cab-drivers-uber-and-the-costs-of-racism/>; Clinton Yates, *When Cabs Whiz By, It’s a Pick-Me-Up*, WASH. POST: THE ROOT DC LIVE (Sept. 28, 2012), http://www.washingtonpost.com/blogs/therootdc/post/uber-when-cabs-whiz-by-its-a-pick-meup/2012/09/28/06a41f0c-082f-11e2-858a-5311df86ab04_blog.html. But cf. Nancy Leong, *Uber, Privacy, and Discrimination*, NANCYLEONG.COM (Apr. 20, 2014), <http://www.nancyleong.com/race-2/uber-privacy-discrimination/> (describing “at least four ways that implicit bias coupled with the design of Uber’s app paves the way for race discrimination”).

²²⁵ See *Accessible Taxi*, *supra* note 202.

education, training drivers on how to help passengers with wheelchairs.²²⁶ Disabled TNC riders should be provided reasonable accommodations, but is it necessary to make TNCs responsible for training them to do so? The answer may depend on whether TNC drivers can be trusted to do the right thing,²²⁷ or to even know what that is and how to do it.²²⁸ TNCs might complain of the expense of compliance,²²⁹ but early regulations have protected the rights of disabled riders rather efficiently by increasing the cost of non-compliance and requiring TNCs to set a standard for driver behavior based on those rules.²³⁰ TNCs driver ratings and reviews further serve to prevent discrimination by easily alerting the company and other riders when problems arise,²³¹ but lawmakers should not hesitate to make clear that anti-discrimination business policies apply with full force in this context.

²²⁶ N.Y.C., N.Y., TAXI & LIMOUSINE COMM'N RULES, § 58-42 (2015), *available at* http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_58.pdf.

²²⁷ Aimee Picchi, *Like Your Uber Driver? He Might Not Like You*, CBS MONEY WATCH (Feb. 24, 2015, 12:52 PM), <http://www.cbsnews.com/news/like-your-uber-driver-he-might-not-like-you/> (discussing the potential problems with Uber's decision to implement a program that allows drivers to rate passengers).

²²⁸ *Salovitz v. Uber Techs., Inc.*, No. A-14-CV-823-LY, 2014 WL 5318031, at *1 (W.D. Tex. Oct. 16, 2014) (“Salovitz asked the driver how he could request an accessible cab from Uber, but the driver stated he did not know how and canceled the ride request.”).

²²⁹ *Id.* at *6 (Uber contends that if the requested injunctive relief in this case were granted, then it would have to modify the Uber App, modify its policies and procedures, and provide wheelchair accessible vehicles in numerous cities which would cause “the cost of compliance” to be “extraordinary.”).

²³⁰ *See* D.C. CODE § 50-320(f) (2015) (repealed 2015) (setting standards of accommodation under Sec. 20f-1 “Accessibility of digital dispatch for individuals with disabilities.”). *See also* Ely Portillo, *Uber Points to D.C. Regulations as a Model for Charlotte*, CHARLOTTE OBSERVER (Oct. 29, 2014, 5:45 PM), <http://www.charlotteobserver.com/news/business/article9207485.html> (quoting Uber senior vice president for policy as saying “I think that D.C.’s a terrific model,” and “[n]ow there are some good examples for cities like Charlotte to look to.”).

²³¹ *Lawsuit Alleges Uber Discriminates Against Blind Passengers With Service Dogs*, S.F. EXAMINER (Sept. 10, 2014), <http://www.sfexaminer.com/sanfrancisco/lawsuit-alleges-uber-discriminates-against-blind-passengers-with-service-dogs/Content?oid=2895322> (quoting the company's statement that “Uber's policy that any driver partner that refuses to transport a service animal will be deactivated from the Uber platform.”).

f. Employee/independent contractor distinction

Regulations are not the appropriate avenue for resolving this question,²³² but because the issue is interwoven with the debate over the transportation-for-hire playing field, it is worth mentioning briefly. Taxicab operators generally are viewed as independent contractors, but may in some cases be classified as employees, depending on the rights at issue, the applicable jurisdiction, and the degree of control exerted over the driver.²³³

TNCs insist that their drivers are not employees.²³⁴ Preliminary reports of pending cases suggest that judges are prepared to say that they are.²³⁵ Uber's drivers have opposed the independent contractor designation as a result of, and as a means for, unequal bargaining

²³² See generally Jamison F. Grella, *From Corporate Express to Fedex Home Delivery: A New Hurdle for Employees Seeking the Protections of the National Labor Relations Act in the D.C. Circuit*, 18 AM. U. J. GENDER SOC. POL'Y & L. 877, 882–89 (2010) (discussing the history of the common law right-to-control test in American courts and highlighting D.C. Circuit cases alternating between employee and independent contractor status for taxi drivers).

²³³ See generally Annotation, *Taxicab Driver as Employee of Owner of Cab, or Independent Contractor, within Social Security and Unemployment Insurance Statutes*, 10 A.L.R.2d 369 (1950) (“There is no absolute rule or test with respect to taxicab drivers . . . for determining whether one is an independent contractor or an employee of the management or establishment in which the service is rendered; each case must be determined largely upon its own facts.”). See also Robert W. Wood, *Legal Requirements That Influence Control of Independent Contractors and Employees*, 10 J. TAX PRAC. & PRO. 51, 54 (2008); David W. McBride, *Call Me A Taxi! Were Cambridge Cab Drivers Employees?*, 25 No. 9 MASS. EMP. L. LETTER 5 (“Massachusetts employers should be very wary of potential misclassification issues because the state's independent contractor statute makes it nearly impossible to classify a worker as an independent contractor.”).

²³⁴ *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6354534, at *6 (N.D. Cal. Dec. 5, 2013) (refusing to accept the employer's labels as controlling in determining employee status, granting in part and denying in part defendant's motion to dismiss). See also *Terms and Conditions*, UBER, <https://www.uber.com/legal/usa/terms> (last updated April 8, 2015).

²³⁵ Patrick Hoge, *Attorney Suing Uber, Lyft in Independent Contractor Case Won Similar Fights for FedEx Drivers, Strippers*, BUS. J.: BIZ WOMEN (Feb. 4, 2015, 5:11 PM EST), <http://www.bizjournals.com/bizwomen/news/profiles-strategies/2015/02/attorney-suing-uber-lyft-in-independent-contractor.html?page=all> (quoting U.S. District Judge Vince Chhabria as saying that Uber's argument that it is “simply a software platform” unpersuasive). See also Marlize van Romburgh, *Judge: Uber, Lyft Drivers May Have Employee Status*, S.F. BUS. TIMES (Feb. 2, 2015, 7:04 AM PST), <http://www.bizjournals.com/sanfrancisco/blog/techflash/2015/02/uber-lyft-drivers-employees-contractors-lawsuit.html> (reporting that U.S. District Judge Vince Chhabria intended to rule that precedent required classifying drivers as employees, but calling aging job categories “woefully outdated.”).

power.²³⁶ Uber does exert some control over drivers, most notably by terminating relationships when driver ratings fall below standards.²³⁷ In *O'Connor v. Uber Techs., Inc.*, this fact was sufficient enough for the plaintiff drivers to withstand Uber's motion to dismiss, but the court was careful to note that "a number of factors weigh against finding an employment relationship, including the fact that the drivers supply the instrumentalities of work—their vehicles—and are paid by the job."²³⁸ The court went on to say that if Uber could prove its arguments that it "has no control over the drivers' hours, which geographic area they target for pickup, or even whether they choose to accept a passenger's request for a ride," then the plaintiff's claim of employee status would be "problematic."²³⁹ Since Uber lets drivers decide when to be available for riders,²⁴⁰ this is a low burden that Uber can be expected to meet. Still, whether a TNC driver is an employee or an independent contractor is not a question that drafters of local regulations can answer with absolute certainty.²⁴¹ Instead, and like taxicab operators, TNC drivers are capable of seeking judicial enforcement of their rights.

B. Early Attempts and Refusals to Regulate

1. *Refusals to accept the distinction between TNCs and taxicabs*

Lawmakers in various places have failed to recognize or accept the distinction between taxicabs and TNCs, clumsily applying existing rules to new business models. Whether for lack of understanding or in frustrated response to Uber's "playbook,"²⁴² the ensuing battle of

²³⁶ Avi Asher-Schapiro, *The Sharing Economy Is Propaganda*, CATO INST.: CATO UNBOUND (Feb. 13, 2015), <http://www.cato-unbound.org/2015/02/13/avi-asher-schapiro/sharing-economy-propaganda> ("Policy makers should not be ensorcelled by 'sharing economy' propaganda. While Uber is a great deal for Wall Street—drivers front all the capital and take on all the risk, while investors scrape off profit—it's a bad deal for workers.").

²³⁷ *O'Connor*, 2013 WL 6354534, at *6. ("[Drivers] are required to follow a litany of detailed requirements imposed on them by Uber and they are graded, and are subject to termination, based on their failure to adhere to these requirements (such as rules regarding their conduct with customers, the cleanliness of their vehicles, their timeliness in picking up customers and taking them to their destination, what they are allowed to say to customers, etc.).").

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Uber Needs Partners Like You*, UBER, <https://get.uber.com/drive/> (last visited Mar. 4, 2015).

²⁴¹ *See generally* Wood, *supra* note 233, at 36 ("Various government agencies and the courts can make their own assessment of who is an employee.").

²⁴² *See supra* notes 73–75, 77–78 and accompanying text.

resistance has led to attacks by fining drivers,²⁴³ impounding vehicles,²⁴⁴ and issuing orders to cease-and-desist operations.²⁴⁵

Some states and cities have accepted the notion that TNCs are not only disruptive innovators, but are flagrantly violating existing laws; Nevada²⁴⁶ and South Carolina²⁴⁷ have each issued statewide bans on TNC operation. Portland, Oregon's Private-for-Hire Transportation Board opposed Uber's entry into that market, but denied that it was seeking to protect the taxicab industry, asserting instead that it was protecting consumers by avoiding a destabilization and weakening of the taxicab market.²⁴⁸ Uber pushed forward and the city responded by banning TNC operations.²⁴⁹ Portland's mayor, Charlie Hales, expressed disappointment that the "discussion started badly with Uber coming to town and operating illegally."²⁵⁰ Uber started by meeting with business and community leaders as early as July of 2013,²⁵¹ but Hales claimed that Uber had not initiated discussions with the city before December 2014, when the company became impatient²⁵² with the city's failure to update its regulations to accommodate TNCs.²⁵³

²⁴³ See *infra* notes 260–61 and accompanying text.

²⁴⁴ See *infra* notes 260–61 and accompanying text.

²⁴⁵ See *infra* notes 247–48 and accompanying text.

²⁴⁶ See *Uber Techs., Inc. v. Second Judicial Dist. Court of State ex rel. Cnty. of Washoe*, No. 66875, 2014 WL 6680785, at *1 (Nev. Nov. 24, 2014) (denying writ relief to petitioner and allowing the Nevada Transportation Authority to enjoin unlicensed operations). See also *Nevada, We're Here for the Long-Term*, UBER BLOG (Nov. 26, 2014), <http://blog.uber.com/NV>.

²⁴⁷ Application of Rasier, LLC for a Class C - Transp. Network Co. Certificate of Pub. Convenience & Necessity for Operation of Motor Vehicle Carrier, No. 2014-372-T (S.C. Pub. Serv. Comm'n Jan. 15, 2015) (denying permission to operate before obtaining Certificate of Public Convenience and Necessity).

²⁴⁸ Taylor Soper, *Why Portland is Keeping Uber Out of the Rose City*, GEEKWIRE (Jan. 2, 2014, 9:51 AM), <http://www.geekwire.com/2014/portland-ridesharing/>.

²⁴⁹ Complaint at 3–15, *City of Portland v. Uber Techs., Inc.*, No. 14CV18915 (Or. Cir. filed Dec. 8, 2014).

²⁵⁰ Douglas MacMillan, *Uber Strikes Deal With Portland to Suspend Service for Three Months*, WALL ST. J. (Dec. 18, 2014, 6:02 PM), <http://blogs.wsj.com/digits/2014/12/18/uber-strikes-deal-with-portland-to-suspend-service-for-three-months/>.

²⁵¹ *We've Set Our Sights on the Rose City*, UBER BLOG (July 15, 2013), http://blog.uber.com/2013/07/15/hello_portland/.

²⁵² See MacMillan, *supra* note 250.

²⁵³ Brad Bourque, *Portland is Keeping it Weird by Keeping Uber Out, So We Took an Illegal Ride*, DIGITAL TRENDS (Dec. 11, 2014), <http://www.digitaltrends.com/features/why-is-uber-in-portland-illegally/> (reporting that in September 2013, Uber requested policy changes from the city, which sent the issue "to a standing committee comprised entirely of transportation-company owners and managers," who denied the request and voted against issuing a permit).

The city finally agreed that new rules were indeed in order,²⁵⁴ and planned to either implement them by April 9, 2015 or allow Uber to resume operations unregulated.²⁵⁵ Uber of Portland says that it “want[s] to be regulated” and that the company already does much of what it expects the city to require it to do, in the form of insurance, driver background checks, and service for disabled riders.²⁵⁶ The city, however, is also considering TNC price regulations.²⁵⁷

Miami-Dade County’s outdated laws required that prearranged transportations services (other than taxicabs) must be booked in advance by at least sixty minutes,²⁵⁸ a rule that protected taxicabs from direct competition with private car services. Uber and Lyft drivers “were previously facing a \$2,000 fine for operating illegally”²⁵⁹ until county commissioners agreed that any for-hire driver could operate as a taxicab.²⁶⁰ Orlando and Tampa regulators have engaged in similar feuds with TNCs.²⁶¹ Florida responded by introducing competing TNC bills, prolonging the debate there, but at least moving away from treating TNCs like illegal cabs, and toward the development of rules that will guide the behavior of both drivers and local officials.²⁶² The proposed acts would not take effect for many months,²⁶³ leaving cities

²⁵⁴ Josh Lowensohn, *Uber Halting its Operations in Portland for 3 Months While a Deal is Worked Out*, THE VERGE (Dec. 18, 2014, 6:19 PM), <http://www.theverge.com/2014/12/18/7418195/uber-halting-its-operations-in-portland-for-3-months-after-being-sued>.

²⁵⁵ See *id.*

²⁵⁶ Kohr Harlan & KOIN News Staff, *Uber Manager: ‘We Want to be Regulated’*, KOIN 6 (Feb. 19, 2015, 5:14 PM), <http://koin.com/2015/02/19/uber-manager-we-want-to-be-regulated/>.

²⁵⁷ See MacMillan, *supra* note 250.

²⁵⁸ Christine Lagorio-Chafkin, *Resistance Is Futile*, INC., <http://www.inc.com/magazine/201307/christine-lagorio/uber-the-car-service-explosive-growth.html> (last visited Sept. 21, 2015).

²⁵⁹ Ross Palombo, *Miami-Dade Commissioners Approve UberX, Lyft Services*, LOCAL10.COM (July 15, 2014, 9:58 PM), <http://www.local10.com/news/miamidade-commissioners-approve-uberx-lyft-services/26966748>.

²⁶⁰ *Miami-Dade County Struggles to Regulate Lyft, UberX*, LOCAL10.COM (June 23, 2014, 2:43 PM), <http://www.local10.com/news/miamidade-county-struggles-to-regulate-lyft-uberx/26616350>.

²⁶¹ Caitlin Johnston, *Bill Would Allow Uber, Lyft to Operate Legally in Florida*, MIAMI HERALD (Feb. 26, 2015), <http://www.miamiherald.com/news/politics-government/article11257229.html>.

²⁶² See Christian Cámara, *Florida May Move Forward on TNC Regs*, RSTREET, <http://www.rstreet.org/2015/02/27/florida-may-move-forward-on-tnc-regs/> (last visited Sept. 16, 2015) (“Although the bills are a long way from conforming to one another, they are poised to ignite a much-needed debate on what role the state should play, if any, in regulating this emerging market.”).

²⁶³ See S.B. 1326, 117th Leg., Reg. Sess. (Fla. 2015); H.B. 817, 117th Leg., Reg. Sess. (Fla. 2015).

and counties in a state of regulatory limbo.

2. *Others that have chosen to wait-and-see*

Arizona's proposed legislation would have taken a position opposite that of Illinois,²⁶⁴ refusing to allow regulations to develop and differ at the local level and preserving that power for the state.²⁶⁵ Those rules would have required vehicle inspections and driver background verifications, but would have required TNCs to provide commercial insurance only after engaging with a rider,²⁶⁶ an insurance gap large enough that the state's governor felt compelled to veto the bill.²⁶⁷ Then-Governor Brewer announced that "Arizona welcomes the TNC industry and offers these companies a business friendly regulatory environment," but insisted that "[c]onsumer safety must not be sacrificed for the sake of innovation."²⁶⁸ The Property Casualty Insurers Association of America agrees that the insurance gap is a problem,²⁶⁹ highlighted by the aforementioned death of a young pedestrian in San Francisco, killed when a driver collided with her while he was logged in to the Uber app, but not engaged with a rider.²⁷⁰ Since the veto, Arizona's new governor, Doug Ducey, has taken a more permissive approach, allowing TNCs to operate while the state legislators once again contemplate and draft comprehensive legislation.²⁷¹ The state's failure to enact appropriate legislation has encouraged media characterization of TNCs as "operating illegally"²⁷² when it seems clear that state lawmakers recognize that taxicabs and TNCs are very different business models.²⁷³

²⁶⁴ See *infra* note 278 and accompanying text.

²⁶⁵ H.B. 2262, 51st Leg., 2d Sess. (Ariz. 2014).

²⁶⁶ See *id.*

²⁶⁷ Letter from Janice K. Brewer, Governor of Arizona, to The Honorable Ken Bennett, Secretary of State of Arizona, Re: House Bill 2261 (transportation network services) (Apr. 24, 2014), available at <http://www.azleg.gov/govlettr/51leg/2R/HB2262.pdf>.

²⁶⁸ *Id.*

²⁶⁹ Don Jergler, *Transportation Network Companies, Uber Liability Gap Worry Insurers*, INS. J. (Feb. 10, 2014), <http://www.insurancejournal.com/magazines/features/2014/02/10/319387.htm> (quoting vice president of state government relations for the Property Casualty Insurers of America as saying that the organization "feel[s] the trigger should be when the driver logs in.").

²⁷⁰ *Id.*

²⁷¹ Robert Anglen, *Arizona Ceases Enforcement Against Uber, Lyft*, THE REPUBLIC (Arizona) (Jan. 29, 2015), <http://www.azcentral.com/story/money/business/consumer/2015/01/29/arizona-ceases-enforcement-uber-lyft/22511197/>.

²⁷² *Id.*

²⁷³ See Lowensoh, *supra* note 255 (quoting Uber as saying that the company

North Carolina's wait-and-see approach has not seemed to hinder Uber expansion,²⁷⁴ where taxicab coalitions appear to be weaker than in states with long established urban cores,²⁷⁵ and doing nothing allows TNCs to write the rules by becoming entrenched in the market.²⁷⁶ This sends a laissez-faire message instead of projecting the perhaps preferable image of actively embracing change, and fails to identify, capture, and accrue potentially significant reputational benefits.²⁷⁷

3. *The inevitable: introducing TNC regulations*

Unlike Arizona, Illinois' governor refused to allow legislators to intervene, vetoing TNC legislation and citing the state's unique constitutional "home rule," and permitting the experiment to play out in Chicago, where taxicab operators are most present, and thus most affected.²⁷⁸ As part of the Chicago experiment, Chicago has committed to develop a mobile app for use by all of its taxicabs in an effort to help cabs remain relevant by competing directly with TNCs.²⁷⁹ Unfortunately, the Chicago ordinance retains significant protectionist measures for taxicabs,²⁸⁰ including rules that prevent TNCs from providing service to and from airports or at taxicab stands,²⁸¹ and illogically prevents pricing based on a combination of distance and time.²⁸²

The Maryland Public Service Commission ("MPSC") recognized that TNCs are not taxicabs by directing its staff to "draft new regulations

wants to work with Portland government officials to "create a regulatory framework that works for everyone" and distinguish between cab drivers and Uber drivers as separate business entities with different requirements).

²⁷⁴ Rachel Adams-Heard, *Uber Expands to 6 More North Carolina Cities*, CHARLOTTE OBSERVER (June 26, 2014), <http://www.charlotteobserver.com/news/business/article9135194.html>.

²⁷⁵ See *supra* notes 55, 134.

²⁷⁶ See Rauch & Schleicher, *supra* note 1, at 24–25.

²⁷⁷ See *infra* notes 301–09 and accompanying text.

²⁷⁸ H.R. 4075, 98th Leg., 2d Reg. Sess. (Ill. 2013) ("To rush into a whole new statewide regulatory network before the need for one is clear would not only stifle innovation, it would be a disservice to consumers who utilize the service while setting a troubling precedent for the future.").

²⁷⁹ Mark Guarino, *Chicago Plans App So Taxis Can Compete with Uber, Ridesharing Services*, REUTERS (Dec. 10, 2014, 9:51 PM), <http://www.reuters.com/article/2014/12/11/us-uber-chicago-idUSKBN0JP07Z20141211>.

²⁸⁰ Jacob Huebert, *The 7 Worst Things in Chicago's Proposed Uber Ordinance*, ILLINOIS POLICY (Feb. 10, 2014), <https://www.illinoispolicy.org/the-7-worst-things-in-chicagos-proposed-uber-ordinance/>.

²⁸¹ CHI, ILL., MUN. CODE tit. 9, § 9-115-160 (proposed Feb. 5, 2014).

²⁸² CHI, ILL., MUN. CODE tit. 9, § 9-115-170 (proposed Feb. 5, 2014).

for non-taxicab for-hire transportation services” and to address issues of insurance, vehicle safety, driver qualifications, and posting and charging of “just and reasonable” rates.²⁸³

The California Public Utilities Commission (“CPUC”) has been a leader among regulatory bodies in attempting to comprehensively address the impact of TNC operations in California.²⁸⁴ It appears that the CPUC coined the term “TNC” when it established rules that addressed most of the concerns mentioned herein.²⁸⁵ Uber participated in the development of the TNC rules largely by opposing each of them,²⁸⁶ but the effort has at least created a foundation for legal responsibilities and remedies for violations.

There is still some considerable tension between California’s lawmakers and enforcers, and Uber.²⁸⁷ District attorneys in San Francisco and Los Angeles have charged Uber with significant and ongoing violations of the CPUC’s TNC rules, citing clashes with airport authorities and general unresponsiveness by Uber to official demands.²⁸⁸

The CPUC has updated its insurance requirements for TNCs to address the tripartite timeline of TNC driver activities.²⁸⁹ The new rule clarifies TNC services as including the first phase (“pre-engagement”), where a TNC driver is seeking to match a rider, but is not yet engaged with one and is also not currently transporting a rider.²⁹⁰ Uber contends that it should not have to carry this financial burden because, although drivers are logged into the app, they are not then operating as part of the TNC and individual driver insurance should be sufficient to cover accidents that take place during this time frame.²⁹¹

²⁸³ In the Matter of an Investigation to Consider the Nature & Extent of Regulation over the Operations of Uber Technologies, Inc. & Other Similar Companies (Md. Pub. Serv. Comm’n Aug. 6, 2014).

²⁸⁴ Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, & New Online-Enabled Transp. Servs., D. 14-10-016, (Cal. P.U.C. Oct. 2, 2014).

²⁸⁵ Liz Gannes, *Ride-Sharing Is Legal in California, Regulators Vote Unanimously*, ALLTHINGSD.COM (Sept. 19, 2013, 1:57 PM), <http://allthingsd.com/20130919/ride-sharing-is-legal-in-california-utilities-commission-votes-unanimously/> (“Commissioners voted 5-0 in a meeting in San Francisco to create a new category called ‘transportation network companies.’”).

²⁸⁶ See Complaint, *supra* note 17, at 13.

²⁸⁷ See *id.* at 19–25.

²⁸⁸ *Id.*

²⁸⁹ See *supra* note 102.

²⁹⁰ See *supra* note 102.

²⁹¹ Dennis Romero, *Uber, Lyft Fight for Freedom From Extra Car Insurance*, L.A. WEEKLY (Aug. 25, 2014), <http://www.laweekly.com/news/uber-lyft-fight-for-freedom-from-extra-car-insurance-5027286> (quoting Uber spokesperson Eva

The Colorado TNC rules closely track those of California's CPUC, setting forth minimum insurance coverage as well as safety rules including vehicle inspections, driver medical fitness, maximum driving hours, and minimum rest periods between shifts.²⁹²

Washington D.C.'s Vehicle-for-Hire Innovation Act²⁹³ also emulates California, with some variations. Uber calls this a model for the rest of the world to follow, citing its mandatory background checks, minimum insurance coverage starting when a rider is engaged, annual vehicle safety inspections, and prohibited street hails.²⁹⁴ The District of Columbia Taxicab Commission ("DCTC") has "expressed resigned acceptance of the bill but approved of its additional safety measures."²⁹⁵ Importantly, the bill allows taxicab operators using apps to emulate Uber's surge pricing model.²⁹⁶

Kentucky's Department of Vehicle Registration also established TNC regulations that close the insurance gap and mandate specific driver background and vehicle safety inspection policies.²⁹⁷ TNCs in Kentucky must ensure that drivers remain in compliance with all parts of the comprehensive rules, including those that set minimum standards for driving records and maintaining a complete roster of drivers.²⁹⁸ When a TNC knows that a driver is out of compliance and fails to take prompt action, responsibility in the form of a statutory penalty is imputed to the TNC.²⁹⁹ With these consumer safety measures, Kentucky creates an expensive administrative burden, but seems to expect TNCs to carry the costs and police themselves, considering that the state has estimated that it will spend just \$1,000 each year to administer the program.³⁰⁰

Behrend as saying that the insurance requirements are "a gift to trial attorneys, big taxi, and insurers that will kill ride-sharing as we know it.").

²⁹² COLO. CODE REGS. § 723-6:6700-03 (2014).

²⁹³ Vehicle-for-Hire Innovation Act of 2014, D.C. Act A20-489 (Dec. 5, 2014).

²⁹⁴ *DC Council Update: Bill Points to Optimistic Future for UberX in DC*, UBER (Oct. 7, 2014), <http://newsroom.uber.com/dc/2014/10/dc-council-update-bill-points-to-optimistic-future-for-uberx-in-dc/>.

²⁹⁵ Laura Owsiany, *DC Council Approves Pro-Uber Legislation*, THE HOYA (Nov. 4, 2014), <http://www.thehoya.com/dc-council-approves-pro-uber-legislation/>.

²⁹⁶ *Id.*

²⁹⁷ 601 KY. ADMIN. REGS. 1:112E (2014) (superseded by 601 KY. ADMIN. REGS. 1:113reg (2015)).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ 601 KY. ADMIN. REGS. 1:113E (2015) (forecasting \$9,000 in revenues generated by fees, expenses of \$7,500 in the first year and \$1,000 in subsequent years, and noting that TNCs will be responsible for ensuring compliance including driver file maintenance).

C. Why Local Lawmakers Should be Embracing TNCs: Economic Impact

Declining to take an early adopter approach will result in lost economic opportunities. For example, anonymized TNC data showing both common and underserved routes could ease some pressures on physical infrastructure, reducing spending by helping cities and states to prioritize where to spend their tight budgets.³⁰¹

The presence of TNCs can also help improve local image by signaling that a city is “‘world class,’—or at least nationally prominent”—which can lead to increased tourism, and even invite new citizens and the business that employ them.³⁰² In the fierce competition to attract new businesses, places that welcome TNCs could be at an advantage when seeking to woo other innovators that will appreciate the local adaptability.³⁰³ More traditional businesses would also benefit from enhanced employee mobility.³⁰⁴

Because Uber drivers must supply their own vehicles, they are more likely to be underemployed than unemployed.³⁰⁵ Uber is “recruiting drivers with ties to the military, . . . [and] reaching out to other professions including full-time employees, teachers, and entrepreneurs who are looking to make money for vacations, gifts, or augment their

³⁰¹ Douglas Macmillan, *Uber Offers Trip Data to Cities, Starting with Boston*, WALL ST. J. (Jan. 13, 2015, 6:00 AM), <http://blogs.wsj.com/digits/2015/01/13/uber-offers-trip-data-to-cities-starting-in-boston/> (paraphrasing Uber’s head of policy for North America Justin Kintz when saying that “Uber’s data could help city officials determine where to build new roads or offer other transportation options based on daily commute patterns. It could also help them prioritize which potholes and other maintenance issues need to be addressed first.”).

³⁰² Rauch & Schleicher, *supra* note 1, at 42.

³⁰³ Ely Portillo & Steve Harrison, *Cab Companies Say Proposed Rules Give Uber, Lyft Unfair Advantage*, CHARLOTTE OBSERVER (Aug. 3, 2014), <http://www.charlotteobserver.com/news/local/article9146627.html> (quoting City Council member Kenny Smith saying that “Charlotte should be doing everything it can to nurture the new technology companies. Having companies like Uber and Lyft makes the city more progressive . . . and will help attract a young, highly educated workforce.”).

³⁰⁴ See *What Is Uber For Business?*, UBERHELP, <https://help.uber.com/h/72c86899-c9d4-449e-9f9c-c0c664c990fa> (last visited Sept. 17, 2015).

³⁰⁵ See generally Emily Badger, *Uber’s Program to Help You Buy a Car Sounds like a Sweet Deal. But It’s Actually Really Risky*, WASH. POST. (Nov. 6, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/06/ubers-program-to-help-you-buy-a-car-sounds-like-a-sweet-deal-but-its-actually-really-risky/> (describing Uber’s campaign to recruit more drivers by offering vehicle financing and suggesting that drivers who already own vehicles may be more likely to apply for positions without such inducement).

income while working on their own business.”³⁰⁶ Local economies can benefit from increased worker income, which will generate both state income tax and local sales tax revenue, and perhaps even decreased unemployment expenditures. Additionally, studies (and common sense) suggest that TNC services could be proving helpful in reducing drunk-driving rates.³⁰⁷

For those that either reject TNCs or prefer to wait-and-see, later adoption may be much more difficult where local regulations have signaled an unwelcoming or uncertain environment for entrepreneurship.³⁰⁸ Depending on the level of indifference or animosity shown to TNCs, cities and states could find themselves not only far behind, but also in the position of being avoided by TNCs and other innovators,³⁰⁹ a reputational trend that will be difficult to reverse.

D. What Can and Should Be Done to Actively Embrace TNCs

Consider that there are four broad options available in a given location: (1) ignore TNC needs and taxicab concerns by doing nothing, (2) denounce TNCs as inimical to local values (i.e., taxicab protectionism), (3) invite TNC presence at the expense of taxicabs, or (4) embrace TNC operations while introducing some laxity to the rules that bind taxicabs.³¹⁰

³⁰⁶ Edward Cardenas, *Uber Expands Driver Recruitment Efforts to Military, Other Professionals*, CBS DETROIT (Feb. 26, 2015, 2:19 PM), <http://detroit.cbslocal.com/2015/02/26/uber-expands-driver-recruitment-efforts-to-military-other-professionals/>.

³⁰⁷ Emily Badger, *Are Uber and Lyft Responsible for Reducing DUIs?*, WASH. POST. (July 10, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/10/are-uber-and-lyft-responsible-for-reducing-duis/>.

³⁰⁸ See generally Steven F. Kreft & Russell S. Sobel, *Public Policy, Entrepreneurship, and Economic Freedom*, 25 CATO J. 595, 609–14 (2005) (“To encourage economic growth, localities must encourage entrepreneurial activity; and to do so, they must focus on creating an environment consistent with economic freedom,” and “a state’s economic freedom consists of an environment of low taxes, low regulations, and secure private property rights, where these factors jointly work to produce economic freedom.”), available at <http://object.cato.org/sites/cato.org/files/s/serials/files/cato-journal/2005/11/cj25n3-15.pdf>.

³⁰⁹ *Id.* at 614 (“Because entrepreneurial activity tends to be the underlying factor that automatically and naturally attracts more venture capital to an area, economic development policies should focus on creating an environment attractive to individual entrepreneurs.”).

³¹⁰ See Letter from FTC staff to Jacques P. Lerner, Gen. Counsel, D.C. Taxicab Comm’n (June 7, 2013), available at <http://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/06/ftc-staff-comments-district-columbia-taxicab>; Letter from FTC staff to Brendan Reilly, Alderman 42nd ward, City Council, City of

The first two options present significant opportunity costs as described above.³¹¹ Option (3) encourages continuing legal disputes³¹² that have little hope of driving the market toward Pareto efficiency.³¹³ The fourth option is the sensible, preferable approach, seizing the opportunities and avoiding the risks of inaction and taxicab protectionism. States can take some broad scope measures to encourage local relevance. First, legislators can refuse to hamstring local regulators³¹⁴ that wish to start the process of experimentation to develop rules that work. This approach risks making some rules that either do not work at all or do not last because of ongoing industry changes, but is preferable to leaving cities and counties without any sense of direction. Second, legislators can enact laws that address some basic principles; i.e., define TNCs in a way that acknowledges the inapplicability of taxicab operator rules³¹⁵ and thus encourages local regulators to create anew.

When drafting TNC laws, regulators should isolate the real challenges presented directly by the TNC business model from the complaints of taxicab operators and medallion owners when addressing legitimate consumer protection questions. Then, separately address the legitimate concerns of taxicab operators by striking outdated laws, condemning local anti-competitive regulations, and paving the way for taxicabs to revitalize their own business models.

Cities and counties can take some micro level actions to encourage their own bodies to act where they are empowered to do so, or state lawmakers to take action where they are not. Local regulatory bodies should assess whether a comparable community has already addressed

Chi., (Apr. 15, 2014), *available at* http://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf; Letter from FTC staff to the State of Colo., Pub. Utils. Comm'n (Mar. 6, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-colorado-public-utilities-commission-concerning-proposed-rulemaking-passenger/130703coloradopublicutilities.pdf.

³¹¹ See generally Kreft & Sobel, *supra* note 308, at 595–96 (“The finding that increased entrepreneurial activity leads to greater economic growth has been well-established at both the national and local levels.”).

³¹² See Complaint, *supra* note 17, at 4.

³¹³ See generally PETER NEWMAN, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 418 (3d ed. 1998) (explaining the economic concept of Pareto efficiency or optimality as the allocation of resources between two parties where no party’s position can be improved without worsening the position of the other party), *available at* http://www.econ.brown.edu/fac/allan_feldman/AMF%20Significant%20Published%20Papers/Kaldor-Hicks%20Compensation.pdf.

³¹⁴ See Moorthy, *supra* note 69.

³¹⁵ See CAL. PUB. UTIL. CODE §§ 5431-5432 (West 2015); see also *supra* text accompanying notes 9, 12.

TNCs and determine if the results have been favorable and, if so, replicate or modify those rules. Where a community believes that its combination of existing laws and economic considerations is unique, it should act quickly to conduct studies to predict the economic impact of the four broad options on the specific location and its constituents. The former option is the more expedient of the two, but the latter may be necessary, particularly if state lawmakers must first be persuaded to allow local experimentation and variation. Cities should, at the very least, make themselves aware of the true costs associated with protecting incumbents they may strongly value. This will allow for an informed assessment of what benefits the status quo (i.e. keeping taxicab operators happy by forcing TNCs to operate within the laws created for taxicabs) actually provides.

Airport authorities also have a significant stake in the early adoption of TNCs, and should discontinue unnecessary contractual arrangements that favor particular taxicab companies.³¹⁶ Taxicab deregulation in the past has been problematic at airports because having too many taxicab firms servicing the properties can result in traffic congestion³¹⁷ and a lack of accountability for poor service.³¹⁸ Permitting TNCs would address both of these problems. First, digitally prearranged trips would obviate the need for congested and noncompetitive taxicab queues that discourage price competition and necessitate fare regulation.³¹⁹ The efficiency of digital dispatch is true anywhere,³²⁰ but is perhaps more cleanly observable in the microcosm of tightly controlled airport grounds than in a sprawling metropolis. Second, TNC driver ratings shift the burden of accountability for thousands of drivers from airport authorities to the TNCs themselves.³²¹ Airports can continue to allow

³¹⁶ DEIGHTON-SMITH, *supra* note 22, at 204 (“Exclusive contracts can help solve the problems associated with unaccountable independent drivers, but it does not directly improve price competition at the queues (unless pricing is made part of the contract) and may not be the approach that would maximize the welfare of taxi riders.”).

³¹⁷ See Moore & Balaker, *supra* note 22, at 113–15 (explaining that price regulation has been necessary at airports because traffic flow necessitated queues that did not support competitive pricing).

³¹⁸ See Moore & Balaker, *supra* note 22, at 124 (explaining that airport authorities have traditionally preferred contracts because limiting the number of taxicab firms that service the airports makes accountability easier).

³¹⁹ FRANKENA & PAUTLER, *supra* note 26, at 8–9 (asserting that problems observed at airports after taxicab deregulation “do not provide an argument in favor of entry restrictions . . .” but instead “suggest that there would be significant efficiency gains from either increasing fare competition at airports” or lowering regulated fares).

³²⁰ See *supra* notes 195, 198, 199, 200 and accompanying text.

³²¹ See *supra* note 237 and accompanying text.

traditional taxicabs curbside as long as travelers continue to desire their services, but would likely find the queues much more manageable when other travelers are diverted to TNCs. Travelers already expect to have these options,³²² and accepting this reality would protect the reputations that cities hold dear in attracting airlines and tourism.³²³

Laxity for taxicab operators is possibly the best approach to dealing with perceived unfairness and encouraging competition.³²⁴ TNCs in any location are almost certainly prohibited from conducting street hails,³²⁵ and this should continue as long as street hailing remains relevant. Street hailing seems unlikely to persist for long, with the advent of digital dispatch,³²⁶ except for those riders who are priced out of TNC service—and pricing concerns are not best handled by anti-competitive laws.³²⁷

³²² See Martin Di Caro, *Why You Won't See Uber Drivers On The App On Airport Property*, WAMU 88.5 (Feb. 24, 2015), http://wamu.org/news/15/02/24/its_now_much_harder_to_hail_an_uber_at_dc_area_airports (explaining that having TNC drivers “waiting outside the terminal for a ride request was efficient — except it was illegal,” because “[Dulles and Reagan] rules forbid drivers for ride-hailing apps from booking trips on airport property.”).

³²³ McClatchy Tribune, *Beyond Rocking Chairs: Airports Race to Upgrade*, WINSTON-SALEM JOURNAL (Jan. 18, 2014, 11:00 PM), http://www.journalnow.com/news/state_region/beyond-rocking-chairs-airports-race-to-upgrade/article_99336edd-fd05-5c05-8d56-dca1b32d19d3.html. (“Call it airport peer pressure: Across the nation, airports are pouring billions of dollars into upgrades. They’re motivated by aging buildings, a desire to keep airlines happy with their hubs in an age of consolidation, and a push to lure travelers into spending more inside the terminal.”).

³²⁴ Koopman et al., *supra* note 1, at 18–19.

³²⁵ See generally NYC TAXI & LIMOUSINE COMM’N, *supra* note 26 (depicting graphically the rules that apply to “other for hire vehicles” including TNCs, proclaiming that “street hailing [is] not permitted”). See also Jonah Bromwich, *Can’t Whistle? Try One of These to Hail a Taxi*, N.Y. TIMES (July 19, 2013), http://www.nytimes.com/2013/07/21/nyregion/cant-whistle-try-one-of-these-to-hail-a-taxi.html?_r=0 (“Neither app will replace the old-fashioned street hail, but both provide a complementary service, a digital two-fingered whistle to summon a ride when the prospects seem hopeless.”).

³²⁶ See *supra* note 201. But see *supra* note 190.

³²⁷ Koopman et al., *supra* note 1, at 12.